Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1996

H&D ENTERTAINMENT, INC., ET AL.,
PETITIONERS,

v.

FLEET NATIONAL BANK, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an agent of a federal court appointed receiver prohibited from purchasing receivership assets?

2. Is a federal court appointed receiver prohibited from retaining his own brokerage firm to act as exclusive broker for the receivership estate?

LIST OF PARTIES

Petitioners H&D Entertainment, Inc. and H&D Management, Inc., as general partner of H&D Broadcasting Limited Partnership, H&D Media Limited Partnership, H&D Radio Limited Partnership and H&D Wireless Limited Partnership, are defendants and counterclaim plaintiffs below. Petitioners Joel M. Hartstone, Hartstone and Dickstein, Inc. and JMH Holdings, Inc. are claimants of the receivership estate below.

Respondent Fleet National Bank is the plaintiff and a counterclaim defendant below. Respondents PNC Bank Ohio, N.A. and Charles E. Giddens, individually, as receiver and as general partner of Media Venture Partners, are additional counterclaim defendants below.

H&D Entertainment, Inc., H&D Management Inc., Hartstone and Dickstein, Inc. and JMH Holdings, Inc. have no parent companies or subsidiaries.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the

First Circuit is reported at 96 F.3d 532 (1st Cir. 1996) and is reprinted in the Appendix hereto at page A-1. The opinion of the United States Court of Appeals for the First Circuit denying rehearing is not reported and is reprinted in the Appendix hereto at page A-55.

The Memorandum and Decision of the United States District Court for the District of Massachusetts (Gertner, D.J.) is reported at 926 F.Supp. 226 (D. Mass. 1996) and is reprinted in the Appendix hereto at page A-19.

JURISDICTION

On January 19, 1996, the United States District Court for the District of Massachusetts issued an oral order approving a sale of receivership assets. The order was formally entered on the docket on January 25, 1996. The District Court supplemented the order with a Memorandum and Decision dated April 9, 1996. On April 12, 1996, the District Court certified the order as a separate final judgment pursuant to Fed. R. Civ. P. 54(b). The District Court's order was affirmed by the United States Court of Appeals for the First Circuit on September 24, 1996. On October 8, 1996, the petitioners timely filed with the Court of Appeals a petition entitled "Petition for Rehearing In Banc." The Court of Appeals treated that petition as both a petition for rehearing and as a suggestion for rehearing en banc and denied both on October 28, 1996.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 327(a) of the United States Bankruptcy Code provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other

> professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. §327(a)

Section 330(a)(1) of the United States Bankruptcy Code provides:

> After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328 and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 —
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
> (B) reimbursement for actual, necessary expenses.

11 U.S.C. §330(a)(1)

Title 18 U.S.C. §154 is entitled "Adverse Interest and Conduct of Officers." That statute provides in pertinent part:

> A person who, being a custodian, trustee, marshal, or other officer of the court —
> (1) knowingly purchases, directly or indirectly, any property of the estate of which the person is such an officer in a case under title 11 . . .
> shall be fined not more than $5,000 and shall forfeit the person's office, which shall thereupon become vacant.

18 U.S.C. §154

STATEMENT OF THE CASE

Inroduction.

Prior to this suit, Petitioners H&D Entertainment, Inc., H&D Management, Inc., as general partner of H&D Broadcasting Limited Partnership, H&D Media Limited Partnership, H&D Radio Limited Partnership and H&D Wireless Limited Partnership ("the H&D Group"), were the owners of certain radio stations and the makers and guarantors of certain obligations to Respondent Fleet National Bank ("Fleet"). Fleet commenced this suit on December 2, 1994, alleging that the H&D Group was in default under its obligations to Fleet and filing an *ex parte* motion to appoint a receiver for the radio stations. Fleet's nominee, Charles E. Giddens ("Giddens"), was appointed receiver ("the Receiver"). The Receiver, in turn, appointed The Zitelman Group, Inc. ("The Zitelman Group") as accountant for the receivership estate. P. Richard Zitelman ("Zitelman") is the principal of The Zitelman Group.

Petitioners bring two principal complaints here: first, that the radio stations ultimately were sold to Spring Broadcasting, L.L.C. ("Spring"), one of whose principals is Zitelman; and second, that the receiver appointed his own brokerage firm, Media Venture Partners ("MVP"), as the exclusive broker for the receivership's property. Both of these actions are contrary to the rule forbidding the receiver or his agents from dealing in or profiting from the receivership's property.

Factual Background And Proceedings Below.

Prior to this suit, members of the H&D Group owned and operated radio stations in Atlantic City, New Jersey, New Bedford, Massachusetts, Groton, Connecticut and Waukegan, Illinois ("the Radio Stations") (A-21). The members of the H&D Group are makers and guarantors of various obligations to Fleet (A-21-22).

Fleet commenced this suit on December 2, 1994 alleging that the H&D Group was in default under those obligations

then totalling approximately $12.9 million (A-3). With its Complaint, Fleet filed an *ex parte* motion to appoint a receiver for the Radio Stations (A-22). On December 5, 1994, Fleet's motion was granted on an *ex parte* basis and Fleet's nominee, Giddens, was appointed the Receiver for the Radio Stations (A-22).

On January 20, 1995, the Receiver retained The Zitelman Group to act as the receivership's accountant (A-25). Zitelman is the principal of The Zitelman Group. On January 24, 1995, the Receiver executed exclusive listing agreements for the Radio Stations with his own brokerage firm, MVP (A-26). MVP then set a deadline of April 13, 1995 for first round bids for the Radio Stations (A-29).

On April 13, 1995, Spring submitted to the Receiver a first round bid of $14,626,000 for the Radio Stations (excluding accounts receivable) (A-29). Zitelman is one of Spring's principals (A-27). Spring's bid was one of twenty-four first round bids for some or all of the Radio Stations (A-29). The next highest bid was a combination of two bids totalling $14,300,000 — $326,000 less than Spring's bid (A-30). At the time Spring submitted its bid, The Zitelman Group was still acting as the Receiver's accountant (A-31).

On April 17, 1995, Zitelman/Spring and the Receiver/MVP entered into an oral agreement pursuant to which Zitelman/Spring agreed to employ the Receiver/MVP as their broker in connection with Zitelman/Spring's anticipated purchase of a second radio station in Atlantic City (A-15). Also on April 17, 1995, the Receiver determined that Spring was the highest qualified first round bidder for the Radio Stations (A-15). Although the Receiver and his counsel considered among themselves the issue whether Zitelman's relationship with Spring posed a conflict of interest, the Receiver chose not to disclose Zitelman's relationship with Spring at the time that he declared Spring the highest qualified first round bidder. Instead, the Receiver waited until after the Petitioners had discovered the relationship, and had brought it to the District Court's attention, to admit to the previously undisclosed

relationship. Similarly, neither the Receiver nor Spring disclosed the agreement for a second commission until after the Petitioners discovered it and brought it to the District Court's attention.

On May 3, 1995, the Receiver's counsel incorrectly stated to the District Court that the next highest bid was between $1,000,000 and $1,200,000 less than Spring's bid (A-29). The Receiver's counsel repeated this misrepresentation to the District Court on May 25, 1995. After May 25, 1995, the Receiver refused to disclose the first round bids other than Spring's bid and the H&D Group did not learn of the misstatement regarding the bids and could not bring it to the District Court's attention until July 31, 1995 when the District Court ordered the Receiver to produce them.

On July 31, 1995, the Receiver and Zitelman/Spring executed their purchase and sale agreement ("the Spring P&S") (A-32).

Between April 17, 1995 and July 31, 1995, the Receiver and Spring negotiated a number of material changes from the terms of Spring's bid. These changes included a $650,000 reduction in the purchase price to $13,976,000 (A-32). At $13,976,000, Spring no longer was the highest first round bidder. Nevertheless, after April 17, 1995, the Receiver never contacted the two bidders whose bids, in combination, totaled $14,300,000. These changes also included a material adverse change clause, which provided that Spring had the right to terminate the sale if the Radio Stations' Arbitron audience ratings or revenues fell too much (A-32), and an increase in the "breakup fee" payable to the Spring, in the case of a higher second round bid, from $130,000 to $250,000.

The Zitelman Group did not resign its engagement as accountant for the receivership estate until June 19, 1995, more than half-way through negotiations of the Spring P&S (A-31).

The Receiver's sale process approved by the District Court called for the Spring P&S to be subjected to a second round of public bidding (A-34). The deadline for second round bids

was October 16, 1995 (A-35). All second round bids were required to be accompanied by a 10% cash deposit. There were no second round bids (A-35).

The District Court held evidentiary hearings on the Receiver's motion to approve the sale to Spring on October 27 and November 3, 1995 (A-35). On November 13 and 30, 1995, before the District Court had ruled, the Receiver filed a pair of motions seeking leave to amend the Spring P&S (A-37). The proposed amendment called for Spring to waive the material adverse change clause (which, it appeared, the Receiver would be unable to satisfy) in exchange for an assignment of the H&D Group's rights to operate an additional radio station in Atlantic City (which rights were worth at least $793,222) (A-39) and a consulting agreement for Spring to manage the Radio Stations pending final approval of the sale for a fee of $30,000 per month (A-37). In the second motion, the Receiver sought to submit the revised sale terms to a third round of public bids (A-37).

The deadline for third round bids was January 12, 1996 (A-38). Once again, all bids were required to be accompanied by a 10% cash deposit. There were no third round bids (A-38).

On January 19, 1996, the District Court held a further evidentiary hearing to consider the revised sale terms (A-38). At the conclusion of that hearing, the District Court issued an oral order from the bench approving the Receiver's proposed sale to Spring (A-54). On April 9, 1996, the District Court supplemented its oral order with a Memorandum and Decision (A-54). In its Memorandum and Decision, the District Court rejected the Petitioners' contention that Zitelman, as the Receiver's accountant, was prohibited from bidding for or purchasing trust assets as a matter of law (A-47-51). Instead, the District Court adopted a case by case approach to the issue whether an agent of a federal court appointed fiduciary may profit from transactions in trust assets (A-47-51). Applying that case by case analysis, the District Court found that there were no grounds for disqualifying Zitelman as a purchaser in this case (A-47-51). The District

Court also rejected the Petitioners' contention that, as a matter of law, the Receiver was prohibited from hiring his own firm to act as broker for the receivership estate (A-40-44). Instead, the District Court approved the arrangement as being in the best interest of the receivership estate (A-40-44).

On September 24, 1996, the Court of Appeals for the First Circuit affirmed the District Court's decision (A-13-15).

Fleet based jurisdiction below on diversity of citizenship puruant to 28 U.S.C. §1332(a)(1).

REASONS FOR GRANTING THE WRIT

I. The First Circuit Court of Appeals' Decision Approving The Sale To Spring Directly Conflicts With This Court's Ruling in *Mosser* v. *Darrow*.

The First Circuit Court of Appeals' decision approving the sale to Spring is contrary to this Court's decision in *Mosser* v. *Darrow*, 341 U.S. 267 (1951). In *Mosser*, the defendant was a court appointed reorganization trustee for two debtors and employed as his assistants two individuals who previously had been the debtors' promoters. *Id.* at 268-69. The trustee engaged in a program of purchasing the debtors' obligations at a discount. *Id.* at 269. However, as a condition of their employment, the trustee agreed to permit his assistants also to trade in the debtors' obligations, which they did, often purchasing them and then reselling them to the trustee at a profit. *Id.* at 269-70. A successor trustee sued and the United States District Court for the Northern District of Illinois surcharged the defendant in the amount of the profits earned by his assistants. *Id.* at 270.

The United States Court of Appeals for the Seventh Circuit reversed the District Court, but was in turn reversed by this Court which stated:

> Equity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are

> always corrupt but because they are always corrupting. By its exclusion of the trustee from any personal interest, it seeks to avoid such delicate inquiries as we have here into the conduct of its own appointees by exacting from them forbearance of all opportunities to advance self-interest that might bring the disinterestedness of their administration into question.
>
> These strict prohibitions would serve little purpose if the trustee were free to authorize others to do what he is forbidden. While there is no charge of it here, it is obvious that this would open up opportunities for devious dealings in the name of others that the trustee could not conduct on his own. The motives of man are too complex for equity to separate in the case of trustees the motive of acquiring efficient help from the motives of favoring help, for any reason at all or from anticipation of counter-favors later to come. We think that which the trustee had no right to do he had no right to authorize, and that the transactions were as forbidden for the benefit of others as they would have been on behalf of the trustee himself.

Id. at 271-72. In reaching this result, this Court did not dispute the trustee's claims that he did not personally profit and that the assistants' services were indispensable and could not have been obtained in any other way. *Id.* at 273-74. But, since "[t]he motives of man are too complex for equity to separate in the case of trustees the motive of acquiring efficient help from the motives of favoring help," these reasons, while powerful, could not justify deviating from the *per se* rule against the trustee or his agents dealing in the estate's property. *Id.*

Like the defendant in *Mosser*, the Receiver in this case is a court appointed fiduciary. Just as the defendant in *Mosser* employed two assistants to act as his agents in conducting the affairs of the bankruptcy estate, the Receiver in this case employed Zitelman as his agent to perform accounting services for the receivership estate. Since, as this Court held,

the assistants in *Mosser* were prohibited from trading in obligations of the bankruptcy estate for their personal benefit, so Zitelman also should not be permitted to trade for his benefit in the assets of the receivership estate in this case.

The clear holding of *Mosser* is that it is always illegal for any agent of a federal court appointed fiduciary to profit personally from transactions involving trust assets. The First Circuit Court of Appeals' decision in this case is directly contrary to that holding. Accordingly, this Court should grant the petition for a writ of certiorari.

II. The First Circuit Court of Appeals' Decision Approving The Sale To Spring Directly Conflicts With Decisions Of The Second and Ninth Circuit Courts Of Appeal.

The issue whether the agent of a federal court appointed fiduciary can purchase trust assets was one of first impression in the First Circuit Court of Appeals. The issue whether court appointed fiduciaries and their agents may profit from their transactions in trust assets has, however, been addressed previously by the Second and Ninth Circuit Courts of Appeals. *See Donovan & Schuenke* v. *Sampsell*, 226 F.2d 804, 808 (9th Cir. 1955); *In re: Frazin & Oppenheim*, 181 F. 307, 309-10 (2nd Cir. 1910). Both of these courts reached the same conclusion: that the interest of preserving the reality and the appearance of integrity in the federal courts requires a *per se* rule prohibiting court appointed fiduciaries and their agents from dealing in trust property.

> . . .[N]o consideration of public policy is deeper grounded upon fundamental principals — upon principals which reach the very foundations of judicial authority — than that courts and court officers must be disinterested in the management of estates committed to their charge. It cannot be permitted that officers appointed by courts to perform duties regarding property

> in custody of the law should speculate therein. It cannot be permitted that court officials should use their official positions for personal profit. The question is not one of fraud or good faith, of gain or loss to the estate, in a particular instance. The rule goes far deeper than that. It is applicable in every case in order to secure and maintain the impartial administration of justice.

In re: Frazin & Oppenheim, 181 F. at 310.

> . . .[A]n interested party need only prove that the purchaser was in a trust relationship with regard to the property itself, the creditors of the estate or the officers of the court, to render the sale void.

Donovan & Schuenke, 226 F.2d at 811.

This rule applies regardless of whether a fiduciary in fact profits from the transaction at the expense of the estate.

> It is elementary that a fiduciary cannot deal or receive a transfer of the property which is the subject of the trust. It makes no difference whether the fiduciary be called an agent, custodian, trustee or officer. It makes no difference whether it can be proved that the fiduciary profited by the transaction. The principle is established by general law and does not depend upon the existence of a statute for enforcement. To affirm this sale would seem to place a premium on shady dealings in a court. . . .

Donovan & Schuenke, 226 F.2d at 812. This rule applies even if the price is a fair one.

> Even if there were full disclosure, adequacy of consideration, absence of secret profit, an open judicial sale will not avail separately or in combination as a defense for such a fiduciary. ***The prohibition is absolute in the public***

> *interest.* It is established to protect the courts themselves from suspicion of chicanery.

Donovan & Schuenke, 226 F.2d at 811 (footnote omitted) (emphasis added). Subsequent withdrawal does not affect the disqualification.

> If one is charged with fiduciary obligations . . . he is not relieved of the burden because he resigns office.

Donovan & Schuenke, 226 F. 2d at 810 n.5; *see also In re: Exennium, Inc.*, 23 B.R. 782, 788 (B.A.P. 9th Cir. 1982).

Any agent or employee of a fiduciary, and in particular a fiduciary's accountant, is held to the same standard. *Donovan & Schuenke*, 226 F. 2d. at 810-11 (the doctrine applies to agents and sub-agents); *In re: Frazin & Oppenheim*, 181 F. at 309 (the rule is broadly applied to embrace all persons who have a duty to perform with respect to the property of others); *See also In re: Q.P.S., Inc.*, 99 B.R. 843, 845 (Bkrtcy. W.D. Tenn. 1989) (citing *Mosser* v. *Darrow*, 341 U.S. 267 (1951)) (fiduciary's accountant cannot purchase trust property).

It is worth noting that the policy choices embodied in *In re: Frazin & Oppenheim* and *Donovan & Schuenke* also have been incorporated by the United States Congress into the United States Bankruptcy Code. Under the Bankruptcy Code, accountants employed by the bankruptcy estate are considered officers of the court. *See* 11 U.S.C. §§ 327 and 330. Under 18 U.S.C. § 154, officers of the court expressly are prohibited from purchasing trust property under penalty of a criminal fine.

Notwithstanding the foregoing, in this case, the First Circuit Court of Appeals rejected a *per se* disqualification in favor of a case by case approach. The First Circuit Court of Appeals ruled that a *per se* rule would disqualify too many potential purchasers to the detriment of the receivership estate (A-14). It also suggested that a case by case analysis adequately served

the interest in the integrity of federal court receiverships (A-14).

The problem with the decision of the First Circuit Court of Appeals is that it gives undue weight to the interest of maximizing the pool of potential bidders and too little weight to the interest of preserving the appearance of integrity for federal court receiverships. As demonstrated by the facts of this case, a case by case approach is inadequate to preserve the appearance of integrity for the courts. The stain on the courts created when a court-appointed fiduciary sells trust property to his agent is indelible and no amount of judicial scrutiny will completely remove it.

In this case, jurisdiction was based on diversity of citizenship. Venue would have been proper in either the Second Circuit or the First Circuit. 28 U.S.C. §1391(a). Furthermore, in this case, under a March 31, 1994 Settlement Agreement between Fleet and the H&D Group, the H&D Group consented to jurisdiction in the First Circuit, but Fleet was not bound by that consent and could have sued elsewhere. By electing to sue in the First Circuit, Fleet was able to obtain a result which would not have been possible in the Second Circuit.

This case is exemplary of a large number of other cases. The receivership remedy most commonly is sought in commercial suits where federal court jurisdiction is based on diversity of citizenship and in cases brought by the Federal Deposit Insurance Corporation ("FDIC"), 12 U.S.C. §1821(d)(18), where federal court jurisdiction is considered federal question jurisdiction. 12 U.S.C. §1819(b)(2)(A). Venue in diversity cases lies either in the districts where the defendants reside or in a district having a substantial relationship to the events or the property that is the subject of the case. 28 U.S.C. §1391(a). Venue in FDIC cases may be the same as in diversity cases, 28 U.S.C. §1391(b), or it may be in the District for the District of Columbia or the district where an insolvent bank did business. 12 U.S.C. §1821(d)(6)(A). Furthermore, it is now common for commercial transactions to include a forum selec-

tion provision. The venue statutes together with private contracts create opportunities for outcome determinative forum-shopping in a large number of the cases where a receivership remedy is likely to be sought.

In order to promote uniformity of federal law, and in order to prevent forum-shopping, this Court should grant the petition for a writ of certiorari.

III. The First Circuit Court Of Appeals' Decision Allowing The Receiver To Hire His Own Firm As A Broker Conflicts With The Second Circuit Court Of Appeals' Recent Decision In *Matanza Shores*.

The First Circuit Court of Appeals decision affirmed the District Court's explicit ruling that the Receiver properly retained his own brokerage firm, MVP, to act as exclusive selling agent for the receivership estate. In its ruling, the District Court specifically relied on the decision of the United States District Court for the Southern District of New York in *In re: Palm Coast: Matanza Shores Ltd. Partnership*, 188 B.R. 741 (S.D. N.Y. 1995) (A-43-44). Since the First Circuit's denial of rehearing in this case, the Second Circuit Court of Appeals has *reversed* the District Court's decision in *Matanza Shores. In re: Palm Coast, Matanza Shores Ltd. Partnership*, 101 F. 3d 253 (2nd Cir. 1996).

In its reversal, the Second Circuit Court of Appeals expressly held that a bankruptcy trustee may not employ his own real estate firm as a consultant to the bankruptcy estate. *Id.* at 258. Although the Second Circuit was interpreting the Bankruptcy Code, its decision was based on common law principles. In this regard, the Second Circuit Court of Appeals stated:

> We can look to the law of Trusts for guidance. Read in the light of the common law of trusts, section 327 must be interpreted to prohibit the trustee from hiring himself in any non-lawyer or non-accountant capacity. This is

> because the law of trusts requires that the trustee, *in his role as trustee*, be disinterested and prohibits him from obtaining interests adverse to the estate. As with any trustee, a bankruptcy trustee owes a duty of loyalty to the beneficiaries of the trust. A trustee is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries. As the Supreme Court stated in 1951, '[e]quity tolerates in bankruptcy trustees no interest adverse to the trust. This is not because such interests are always corrupt but because they are always corrupting'
>
> . . .
>
> A trustee who hires his own professional firm to assist him cannot be a disinterested person who has no interest adverse to the estate. Once the trustee's firm is hired by the estate, the trustee's personal interests are implicated. At that point, the trustee's independence and disinterestedness are compromised by a potential conflict of interest. The trustee may be placed in a position where it would be to his benefit to harm the reorganization or dissolution of the estate. Because '[e]quity tolerates in bankruptcy trustees no interest adverse to the trust,' we hold that a trustee is not permitted to hire his own firm in a non-lawyer or non-accountant capacity.

Id. at 257-58 (footnote and citations omitted). As a result, the First Circuit Court of Appeals decision is in conflict with the law in the Second Circuit on this important issue affecting the integrity of federal court receiverships. Accordingly, this Court should grant the petition for a writ of certiorari.

IV. The Conflicts Are Real.

A. *The Issue Is One Of Federal Law.*

Although jurisdiction below was based on diversity of citizenship, the issues which this case raises are issues of federal law. The rules governing the conduct of federal court appointed fiduciaries have their source in the common law of trusts interpreted by the federal courts, not in the law of the forum state. *Aviation Supply Corp.* v. *R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993). Put another way, for purposes of the analysis dictated by *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the rules governing the conduct of federal court appointed fiduciaries are deemed procedural, not substantive. *Id.*

B. *Although The Petitioner Cites Bankruptcy Cases, Those Cases Apply The Common Law Of Trusts.*

Although *Mosser* involved a reorganization trustee, that is not a basis for distinguishing it from this case. The decision in *Mosser* was based on the federal common law of trusts, not on any rule unique to bankruptcy. *Id.* at 271-75. The holding in *Mosser* is, therefore, applicable to all federal courtappointed fiduciaries and their agents, including the Receiver and Zitelman. Similarly, although *In re: Frazin & Oppenheim* and *Donovan & Schuenke* were bankruptcy cases, their principals are of general application.

> This does not depend upon the statutes relating to bankruptcy nor the principals of bankruptcy law or regulation. Rather, it depends upon the doctrines of the established law of equity, which applies to all fiduciaries, whether they be express trustees, agents or subagents.

Donovan & Schuenke, 226 F. 2d at 808.

> . . .[D]isqualification as a fiduciary 'does not depend upon the statute relating to bankruptcy.' Disqualification based on public policy is likewise not dependent on statute, although it is reinforced by the criminal sanctions of 18 U.S.C. §154.

In Re: Exennium, Inc., 23 B.R. at 787. Finally, although *Matanza Shores* interpreted a provision of the Bankruptcy Code, it also relied on the common law of trusts to do so. 101 F.2d at 257-58. Accordingly, the conflict between the First Circuit, on the one hand, and this Court, the Second Circuit and the Ninth Circuit, on the other, is real and warrants granting the petition for a writ of certiorari.

CONCLUSION

For the above-stated reasons, the Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 96-1218
No. 96-1523

FLEET NATIONAL BANK,
PLAINTIFF, APPELLEE,

v.

H&D ENTERTAINMENT, INC.,
(F/K/A DOVER BROADCASTING, INC.),
AND H&D MANAGEMENT, INC.,
AS GENERAL PARTNER OF EACH OF
H&D BROADCASTING LIMITED PARTNERSHIP,
H&D MEDIA LIMITED PARTNERSHIP,
H&D RADIO LIMITED PARTNERSHIP, AND
H&D WIRELESS LIMITED PARTNERSHIP,
DEFENDANTS, APPELLANTS,

v.

PNC BANK, OHIO, N.A.,
CHARLES E. GIDDENS, INDIVIDUALLY, AS RECEIVER
AND AS GENERAL PARTNER OF
MEDIA VENTURE PARTNERS,
ADDITIONAL COUNTERCLAIM DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. NANCY GERTNER, *U.S. District Judge*]

BEFORE
TORRUELLA, *Chief Judge*,
BOUDIN, *Circuit Judge*,
and BARBADORO,* *District Judge*.

Stephen F. Gordon with whom *Stanley W. Wheatley* and *Gordon & Wise* were on briefs for defendants, appellants H&D Entertainment, Inc. and H&D Management, Inc., and claimants, appel-

*Of the District of New Hampshire, sitting by designation.

lants, Joel M. Hartstone, Barry J. Dickstein, Hartstone and Dickstein, Inc., Barry Dickstein & Co., Inc. and Joan Rory Hartstone.

John D. Hanify and *Charles L. Glerum* with whom *Harold B. Murphy, Matthew P. McCue, Hanify & King, P.C., Paul E. Morton, Morton & McCrevan, Sara A. Walker, Joseph H. Zwicker, Terri L. Ross* and *Choate, Hall & Stewart* were on briefs for appellees.

September 24, 1996

BOUDIN, *Circuit Judge.* At issue in this case are two different appeals, which we have consolidated, whose source is a lawsuit over unpaid bank loans. In one appeal, the borrowers contest the grant of summary judgment in favor of the lending bank; in the other appeal, the borrowers challenge the district court's approval of a sale by the receiver of borrower assets that secured the loans. In both instances, we affirm.

The background facts are largely undisputed. Between 1983 and 1988, Fleet National Bank ("Fleet") provided various interrelated loans and lines of credit to H&D Entertainment, Inc., and other associated corporations and partnerships (collectively, "the borrowers"); the borrowers were licensees or had other ownership interests in radio stations in various cities, and those assets secured the loans. In early 1994, Fleet concluded that the borrowers were in default and brought suit in two different federal district courts to collect upon different notes made or guaranteed by the borrowers.

On March 31, 1994, Fleet and the borrowers entered into a written settlement agreement. In exchange for Fleet's forbearance on the loans and dismissal of its law suits, the borrowers agreed to a repayment plan based on the sale of the radio stations. The settlement agreement provided that if the borrowers failed to comply with the plan's terms, this failure would end Fleet's forbearance obligation and also constitute the borrower's consent to the appointment of a receiver who would muster the assets and pay the debts.

Fleet claims that on November 30, 1994, the borrowers missed the first deadline established under the settlement

agreement. As Fleet reads the agreement, the borrowers were required by that date either to have made a down payment of $6.4 million or to have in force purchase agreements with third parties obligating the latter to buy stations from the borrowers for that amount or more. The borrowers dispute this reading. The precise terms of the settlement agreement and other pertinent facts are set forth below.

On December 2, 1994, Fleet brought the present action in the federal district court in Massachusetts against the borrowers seeking over $12.9 million plus interest based on the notes and guarantees. Later, the borrowers counterclaimed. In the meantime, Fleet moved for the appointment of Charles Giddens as receiver for the stations. Giddens had an extensive backgound in appraising and selling radio stations and was a partner in a brokerage firm, Media Venture Partners, experienced in this field. In the past, Giddens had been appointed by courts to serve as receiver for radio stations and his firm had acted as broker in their sale.

The district court designated Giddens as receiver and thereafter approved his retention of Media Venture Partners to act as broker in the sale of the stations, comprising four principal properties in Connecticut, Illinois, Massachusetts and New Jersey. Giddens also retained The Zitelman Group, Inc., to prepare monthly financial statements for the stations and certain tax filings. The Zitelman Group was one of the few firms known to Giddens as experienced in radio station accounting and prepared to do such work on a temporary basis.

In March 1995, Media Venture Partners solicited bids from several hundred possible purchasers, widely publicizing the proposed sale. The largest bid, offering to buy all four station properties for approximately $15.3 million, was made by Spring Broadcasting, L.L.C. ("Spring"), which is associated in ownership and management with The Zitelman Group. The bid was subject to further examination by the bidder and further negotiations. At Giddens' request, The Zitelman Group resigned its bookkeeping tasks in June 1995, so that

Giddens could freely negotiate a definitive purchase agreement with Spring.

Throughout the period, the borrowers made constant objections to the receiver, the proposed sale, and many other details. It appears that the prospective sale price being negotiated would not even cover in full the borrowers' debts to Fleet plus interest, let alone leave any equity for the borrowers. Thus, the borrowers had little incentive to cooperate in the receiver sale. Still, as the district court pointed out, the prospective deficiency did give Fleet reason to obtain as much as possible for the stations.

During the spring of 1995, Fleet and the borrowers filed cross motions for partial or complete summary judgment, the central issue being whether the borrowers had breached the settlement agreement. The cross motions were heard by a magistrate judge in June 1995. In early July 1995, the magistrate judge wrote a lengthy report and recommendation, concluding that Fleet's motion should be granted and the borrowers' motion should be denied. Ultimately, the district court approved the report and recommendations of the magistrate judge. This resolution would have disposed of most but not all of the claims on each side.

Giddens and Spring negotiated a final purchase price of just under $14 million during the summer of 1995, the lower price reflecting some deterioration of the stations and other adjustments. The magistrate judge held hearings, heard objections, and ultimately approved Giddens' proposal as to the procedures for completing the sale. This involved a second round of bidding, effectively inviting others to exceed the Spring offer. Information was furnished to prospective bidders, but no such bids were made. During this period the borrowers conduct discovery. In October and November 1995 the district court held hearings on the proposed sale.

During the fall, Giddens and Spring modified the proposed sale in certain respects. When the borrowers asked for a new round of competitive bidding because of the changes, Giddens conducted a third round of bidding ending in January 1996.

No better bids were made. Further discovery was allowed to the borrowers. In January 1996 the district court held a further evidentiary hearing and then approved the sale from the bench. In April 1996, the district court issued a lengthy decision explaining its decision to approve the sale to Spring. *Fleet National Bank* v. *H&D Entertainment, Inc.*, 926 F.Supp. 226 (D. Mass. 1996).

1. The borrowers have now appealed both from the order resolving the summary judgment motions and from the order approving the receiver's sale of the stations to Spring. At the outset, the borrowers argue that the summary judgment order is not properly before us, because it did not dispose fully of all of the claims or all of the counterclaims.[1] For this reason, the district court directed, on approving the magistrate judge's report and recommendation, "that final judgment be entered, pursuant to [Fed. R. Civ. P.] 54(b) and 28 U.S.C. § 1291."

The borrowers do not argue that the district court failed to make or support the finding required by Rule 54(b) for a separate judgment on less than all claims or parties, namely, that there is "no just reason for delay." Rather, they simply assert that there is case law forbidding the use of Rule 54(b) as to any claim that has been adjudicated as to liability but not damages. *E.g.*, *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 744 (1976). This is the status of most of Fleet's claims against the borrowers, although Fleet says, citing *Herzog Contracting Corp.* v. *McGowen Corp.*, 976 F.2d 1062, 1064 (7th Cir. 1992), that the mere calculation of interest due is ministerial and should not impair finality as to those claims.

The borrowers' objection to their own appeal is an ill advised attempt to throw sand in the wheels. The district court's order approving the sale of the stations to Spring *is* properly before us — because by judicial gloss, such an order

[1] On Fleet's claims, seven of the eight counts involved computation of damages and at least the interest component remained to be resolved. As for the borrowers' counterclaims the claims against Fleet were fully resolved but two other claims directed by the borrowers against the receiver were not.

is treated as a final decision under 28 U.S.C., § 1291, because of its importance and irrevocable character.[2] And in reviewing the sale order, the borrowers are free to challenge any other ruling of the district court that underpins the sale order. *E.g.*, *Avery* v. *Secretary of Health & Human Servs.*, 762 F.2d 158, 161 (1st Cir. 1985); 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3921 (1977).

Here, the decision that the borrowers violated the settlement agreement does underpin the sale. The borrowers' violation is the central premise for the appointment of the receiver and the authorization permitting the receiver to sell the security. In short, the borrowers are free, in challenging the sale order, to make their central claim that they did not violate the settlement agreement. This would be so even if Rule 54(b) had never been invoked as to the summary judgment order, and even if the summary judgment order were not before us except as a premise of the sale order.

Conversely, the borrowers are mistaken in thinking that if they successfully challenged the Rule 54(a) designation, they could undo or invalidate the district courts decision on summary judgment. At best, they might *limit* this court's review to those aspects of the summary judgment decision that directly underpin the order approving the sale. But, so far as we can ascertain, the *only* attack made by the borrowers is on just such an aspect of the summary judgment decision, namely, the ruling that the borrowers breached the settlement agreement.

Thus, we have jurisdiction both over the order approving the sale and, incident to review of that order, over the only attack made on the summary judgment decision, regardless of *Herzog Contracting*. Further, the district court's order

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[2] *SEC* v. *American Bd. of Trade, Inc.*, 829 F.2d 341, 344 (2d Cir. 1987), *cert. denied* 486 U.S. 1034 (1988); *Citibank, N.A.* v. *Data Lease Fin. Corp.*, 645 F.2d 333, 337 (5th Cir. 1981). *See generally Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 203-04 (1848); 15A Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure* § 3910 (2d ed. 1991 & Supp. 1996).

directed to the summary judgment motions is properly before us under Rule 54(b) at least insofar as that order completely disposes of most of the borrowers' individual counterclaims. Since we have plenary jurisdiction over the summary judgment order at least as to those claims, we are free to review — and affirm — both orders against the only attack made upon them.

2. We turn now to the merits of that attack, namely, the district court's ruling that the borrowers breached the settlement agreement by failing either to make a $6.4 million initial payment by November 30, 1994, or alternatively to make sales agreements by that time in a comparable amount. Summary judgment is proper if there are no genuine issues of material fact and the law otherwise warrants judgment for the moving party; inferences and credibility are taken in favor of the opposing party; and review on appeal is *de novo*. *Roy* v. *Inhabitants of the City of Lewiston*, 42 F.3d 691, 694 (1st Cir. 1994).

The settlement agreement (in section 5(a)) required the borrowers either to have paid Fleet $6.4 million by November 30, 1994 — which did not occur — or to meet an alternative condition stated as follows:

> On or prior to November 30, 1994, members of the Borrower Group shall have . . . entered into binding [purchase and sale] agreements . . . which shall have become fully effective as contemplated below, providing for the sale, to one or more purchasers, of two or more Station Combinations providing for aggregate Net Sales Proceeds of not less that $6,400,000. . . .

Later dates were provided by which two further specified payments (or sales contracts in like amounts) were to be made.

In addition, the settlement agreement provided (in section 5(e)) a trio of corresponding dates by which contracted-for station sales had to be completed. Thus, the first sale — contracted for by November 30, 1994, for not less than $6.4 million — had to be consummated by March 31, 1995. The five-month lag time was set to permit the necessary approval of

license transfers by the Federal Communications Commission. This provision also required the borrowers to use their best efforts to obtain FCC approval, but it provided for reasonable extensions of time if, despite the borrowers' diligence, FCC approval were delayed past March 31, 1995 (or comparable dates for the other two installments).

In this court, both sides agree that by November 30, 1994, the borrowers had paid only $1,050,000 toward their debt. But, on summary judgment, the borrowers said that they satisfied the *alternative* obligation under section 5(a) — quoted above — by entering into an agreement to sell stations for enough money to generate the balance of the $6.4 million first payment. The facts as to what happened are largely undisputed; the disagreement before us turns on an issue of contract interpretation.

On June 23, 1994, well in advance of November 30, 1994, deadline, the borrowers contracted to sell two of the stations to a third party for amounts that, taken together with the prior $1 million payment, would have satisfied the November 30, 1994, obligation. This June 1994 sales contract conditioned the buyers obligation on one of the radio stations attaining a listenership ranking of number 1 or 2 in the demographic category of adults age 25-54, as determined by the Arbitron ratings service. In July 1994, before consummation, new Arbitron ratings placed the station in seventh place and, in September 1994, the buyer terminated the sales contract.

On summary judgment and on appeal, the borrowers' central position has been that they complied with the literal terms of the settlement agreement because, in the words of section 5(a) quoted above, they "entered into" the required "binding" and "fully effective" contract "[o]n or prior to" November 30, 1994. The borrowers say that it is no part of their problem that their June 1994 contract to sell the stations lapsed well before November 30, 1994, and that no such sales contract was in effect on that date. We join the magistrate judge and the district court in rejecting the borrowers' reading of the settlement agreement.

By its own terms, the settlement agreement is to be read in accordance with Massachusetts law. Under the precedents, ably parsed by the magistrate judge in his report adopted by the district court, a contract governed by Massachusetts law must be construed in accord with common sense, the likely intent of the parties and (in commercial cases) "as a business transaction entered into by practical [people] to accomplish an honest and straightforward end." *Shapiro* v. *Grinspoon*, 541 N.E.2d 359, 363 (Mass. App. Ct. 1989). In short, words matter; but the words are to be read as elements in a practical working document and not as a crossword puzzle.

In all likelihood, the phrase "fully effective" in the settlement agreement refers to the satisfaction of certain conditions precedent specified in the settlement agreement itself (*e.g.*, the borrowers' filing of FCC applications for license transfer within 20 days). The magistrate judge — whose report the district court adopted — reasoned that the term "binding," to avoid superfluity, should be read to exclude "contingent purchase obligations which lapsed before ever ripening into absolute ones." Thus, he concluded that even on the most literal reading, the borrowers failed to meet the requirement.

In our view, it is uncertain whether the parties to the settlement agreement entertained any very precise notion of the meaning of "binding." The term is often used — redundantly in most contexts — to mean legally enforceable, *Black's Law Dictionary* 168-69 (6th ed. 1990), and lawyers typically overwrite documents in this fashion. Further, at least one condition subsequent — that of FCC approval — was likely to remain unresolved until after November 30. But we think that even if the term "binding" is given no special meaning, the result is the same based upon a common-sense appraisal, elsewhere stressed by the magistrate judge.

A self-evident aim of the settlement agreement was to make certain, by November 30, 1994, that future payment to Fleet of the $6.4 million was reasonably assured, assuming that actual payment had not already occurred. By law, the intended assurance would still be subject to the specific condi-

tion of FCC approval of the license transfers; and, of course, bankruptcy of the buyer or other intervening events might otherwise have frustrated the sale. But a sales contract that lapsed by its own terms prior to November 30 simply does not satisfy the obvious basic objective of providing reasonable assurance to Fleet.

To adopt this view does not require that we suppose that the parties had an exact and identical view of how every contingency or condition might satisfy or violate the settlement agreement. It is enough that reasonable parties would not have believed that this settlement agreement would be satisfied where the seller and buyer built into the sales contract a significant condition subsequent that defeated the obligation to buy and led to the lapsing of the contract prior to November 30. *See generally Cooke* v. *Lynn Sand & Stone Co.*, 70 F.3d 201, 204-05 (1st Cir. 1995). Other variations might present more difficulties.

The borrowers have a fall-back position. They argue that the settlement agreement is at worst ambiguous and that, given the ambiguity, they are entitled to a trial to present evidence. Further, they point to the affidavit of Joel Hartstone, a leading figure in the management of the borrowers, that in the course of negotiating the settlement agreement,

> there were specific discussions regarding the understanding that, if the Borrower Group fulfilled its good faith efforts obligations by entering into purchase and sale agreements, and if those agreements then terminated, the Borrower Group still would have until the principal payment deadline to consummate a transaction with a substitute purchaser.

Hartstone's gloss is highly unlikely as a statement of the parties' actual intent in section 5(a) but not quite impossible. It is highly unlikely because it is so serious a departure from the words and structure of the settlement agreement. Nothing in section 5(a) suggests that the contract signing was merely a "good faith efforts" hurdle; if that was the intention, it could easily have been expressed. Further, there is a lucid "best

efforts" clause in section 5(e), pertaining to the borrowers' duty to seek FCC approval, but none in section 5(a).

Still, this would be a more difficult case if there were solid extrinsic proof — that is, evidence independent of the words of the settlement agreement — that the parties mutually intended section 5(a) to have the meaning claimed by Hartstone. The contract could rationally have been drafted as Hartstone urges, and sometimes parties fail to express themselves clearly in their drafting. This looks, at first glance, like a classic problem as to when extrinsic evidence may be offered to assist in contract interpretation, an issue largely governed by the parol evidence rule.

Somewhat simplified, the traditional version of the parol evidence rule is that a contract provision is either clear or ambiguous and that, in the former case, extrinsic evidence of negotiations is prohibited (if the contract was intended to be a complete integration). The modern approach, embodied in the *Restatement (Second) of Contracts* (1981), allows extrinsic evidence to "interpret" even a seemingly unambiguous contract, but not to vary or contradict its terms. *Id.* § 212(1) and comment b, and § 214(c) (1981). *See* Farnsworth, *Contracts* § 7.12 (1990); *Restatement (Second) of Contracts.* Massachusetts courts may tend toward the older view but not unequivocally so. *Compare ITT Corp.* v. *LTX Corp.*, 926 F.2d 1258, 1261-62 (1st Cir. 1991), *with Robert Indus. Inc.* v. *Spence*, 291 N.E.2d 407 (Mass. 1973).

In this case, the elaborate settlement agreement was plainly intended as a complete integration and contains a clause to this effect. Thus, if the Hartstone affidavit were sufficient, it would pose nice questions as to whether Massachusetts law requires an ambiguity before permitting extrinsic evidence, (if so) whether the agreement is ambiguous on the point at issue, and (above all) whether the Hartstone gloss can be said to explain — rather than contradict — the terms of the agreement. A factfinder might also have to decide whether Hartstone's affidavit correctly and fully described what was said at the negotiations.

But Hartstone's affidavit is not sufficient to raise a genuine issue of material fact. The affidavit contains only the conclusory assertion that in the negotiations there were "specific discussions" adopting his best-efforts interpretation. No dates, names or actual statements are supplied; not a single "specific" is set forth to demonstrate, or even illustrate, the content of the alleged "specific discussions." There is only some lawyer-like argument in a further paragraph as to why Hartstone's "best efforts" gloss conformed to the general tenor of the agreement.

Thus, the quoted passage in Hartstone's affidavit did not create a genuine issue of fact as to what happened at the negotiations. Nor did it supply specific facts that, if uncontested, might have affected the district court's own reading of the settlement agreement. *Cf. Lumpkin* v. *Envirodyne Indus., Inc.*, 933 F.2d 449, 456 (7th Cir. 1991) (court may construe document if facts undisputed). It is just the kind of conclusory affidavit statement that is regularly disregarded by courts. *Wynne* v. *Tufts Univ. Sch. of Medicine*, 932 F.2d 19, 27-28 (1st Cir. 1991); *Posadas de Puerto Rico, Inc.* v. *Radin*, 856 F.2d 399, 401-02 (1st Cir. 1988).

3. The remaining issue is whether the district court erred in approving the receiver's agreement to sell the stations to Spring. The district court has wide discretion in judging whether a receiver's sale is fair in terms and result and serves the best interests of the estate. *E.g.*, *United States* v. *Peters*, 777 F.2d 1294, 1298 n.6 (7th Cir. 1985). On review, an abuse of discretion standard governs such judgments, although subsidiary findings of fact are reviewed under a clearly erroneous standard and propositions of law are subject to *de novo* review. *Pye* v. *Teamsters Local Union No. 122*, 61 F.3d 1013, 1018 (1st Cir. 1995).

In this case, the borrowers make almost a dozen different attacks on the sale, but only a few require discussion. The first attack, and the one most vigorously argued, arises from the fact that the winning bidder-buyer (Spring) was closely associated with the company (The Zitelman Group) that until

June 1994 performed specified accounting services for the seller-receiver (Giddens). For present purposes, we omit the details of the association and *(arguendo)* treat the case as if Spring and The Zitelman Group were one entity.

Exceptions aside, a full-fledged fiduciary, such as trustee or a court-appointed receiver like Giddens, may not normally sell estate property to himself even if the terms are fair. *Restatement (Second) of Trusts* § 170 comment b (1959); Bogert, *The Law of Trusts and Trustees* § 543, at 248 (rev. 2d ed. 1993); Scott & Fratcher, *The Law of Trusts* § 170.1 (4th ed. 1987); *see, e.g., Attorney General* v. *Flynn*, 120 N.E.2d 296, 302 (Mass. 1954). The central reason is obvious: despite the safeguard of court oversight, the main assurance that the estate will be maximized is the zeal of the seller to secure the best price, and that zeal is likely to be tempered if the seller is selling to himself. Bogert, *supra*. The benefits of the general ban outweigh the risk that, in an individual case, the receiver might otherwise be the highest bidder.

The borrowers in this case urge that The Zitelman Group ought to be viewed as a fiduciary. While the label is not an exact term, *see SEC* v. *Chenery*, 318 U.S. 80, 85-86 (1943); *Restatement (Second) Torts* § 874 comment a (1979), we agree with the district court that the specific accounting tasks allotted to The Zitelman Group were narrow, mechanical, and unrelated to the sale. The district court's findings to this effect, 926 F.Supp. at 242-43, have not been impeached. If The Zitelman Group had been engaged as the receiver's financial advisor on the sale, our view might be different.

In the alternative, the borrowers urge that the general ban on trustee buying trust property ought to extend with the same force to *anyone* who is employed or engaged by the fiduciary, as The Zitelman Group was in performing accounting services. This is an arguable position (we ignore the possible significance of the June resignation), and there are a few cases that purport to support such a general ban on those who assist a fiduciary. *E.g., Donovan & Schuenke* v. *Sampsell*, 226 F.2d

804, 811 (9th Cir.), *cert. denied*, 350 U.S. 895 (1955); *In re Q.P.S., Inc.*, 99 B.R. 843, 845 (Bankr. W.D. Tenn. 1989).

But, as the district court showed, it is not clear that the ban is uniformly followed even in those few jurisdictions that purport to adopt it. 926 F.Supp. at 244 n.64. And the greater weight of authority is that any judgments as to disqualification of a non-fiduciary purchaser should be made on a case by case basis, taking account of all of the surrounding circumstances. *Id.* at 244; *Restatement (Second) of Trusts* § 170 comment e; Bogert, *supra*, 543, at 254; Scott & Fratcher, *supra*, § 170.6; *see, e.g., Burlingham* v. *Worcester*, 218 N.E.2d 123, 126 (Mass. 1966); *Gunther* v. *Gove*, 175 N.E. 464, 467 (Mass. 1931).

The central reason for disqualifying the fiduciary as a buyer is that there is no one else who can similarly protect the estate's interest. *See* Bogert, *supra*, § 543, at 227-28. But where the purchaser is merely hired by the fiduciary to perform a discrete and narrow function unrelated to the sale, the fiduciary's guardian role is not automatically impaired. On the contrary, the fiduciary should still have every incentive to refuse to sell unless the purchaser is making the most attractive available offer. Thus, there is often little risk that the estate will be disserved by allowing the bid.

The general rule, by disqualifying the fiduciary as a bidder, might in some rare case foreclose the highest bidder, but only one such bidder is lost. If courts extend that circle of automatic disqualification, the risk becomes greater of harming the estate by limiting those who might offer the highest price. This is especially so in cases where the universe of serious buyers is likely to be small, as may well be the case here. And, of course, even without a rigid rule disqalification, an objecting party is free to argue on particular facts against a proposed sale to someone employed by the fiduciary.

Here, the borrowers do argue that The Zitelman Group's access to inside information did give Spring an advantage in framing its bid. If Spring had thereby bid less than it otherwise would have, interesting problems of remedy might arise —

for it still might not help the estate to throw out the highest bid made to it. In all events, the district court specifically found that the information available to The Zitelman Group was not "confidential information or even raw financial data," 926 F.Supp. at 243, and was effectively available to other bidders. *Id.* at 233 n.22.

On appeal, the borrowers make no effort to show that the monthly financial statements or any other information available to The Zitelman Group gave Spring any unique advantage over the information available to all bidders. On the contrary, the prospective bidders were supplied with more detailed and pertinent information than the limited data available to The Zitelman Group for accounting purposes. 926 F.Supp. at 233 & n.23. The borrowers' brief gives us no reason even to suspect error on this finding, let alone clear error.

We turn now to a quite different attack made by the borrowers on the sale. The borrowers assert that the receiver or his associated brokerage company, Media Venture Partners, accepted a "bribe" from Spring by agreeing to act as Spring's broker to buy another radio station in the Atlantic City area. Apparently, in April 1995, at virtually the same time that Spring submitted the winning bid in the first round, Spring offered Media Venture Partners a commission to secure Spring a second station in the same city.

To describe this offer as a proven bribe is a dramatic overstatement. Zitelman (who headed The Zitelman Group) himself testified at a hearing that the offer of a commission to Spring to procure a second station in Atlantic City was an arm's length agreement unrelated (except by Spring's desire for a duopoly) to the receiver's sale of the borrowers' stations. The borrowers apparently did not even cross-examine Zitelman on this issue. The district court did not discuss the episode, perhaps because the borrowers developed very little evidence about it in the district court. The borrowers apparently did not even cross-examine Zitelman on this issue.

In this court, the borrowers simply repeat their charge that the commission was a bribe. If it were, the matter would be

very serious. But the borrowers have adduced no evidence that the commission was intended by Spring as a bribe, regarded by Giddens or Media Venture Partners in that light, or that it had any effect on the sale of the borrowers' station. Out of an abundance of caution we have read what can be found in the record on the subject, and it does not alter our conclusion.

The borrowers might have argued that, as a prophylactic matter, a receiver who is selling property should be barred from any other dealing with the buyer in the same time frame. A federal judge, for example, could not normally accept a gift from a lawyer litigating a case before that judge. 5 U.S.C. § 7353(a)(1) (1994); Code of Conduct for United States Judges, Canon 5(4). But the borrowers have made no effort to offer citations or arguments for such a prophylactic rule here; and it is certainly not self-evident that so broad a rule would make sense in the context of ordinary business transactions.

Finally, the borrowers offer a motley of other attacks on the sale. These include charges that Media Venture Partners helped Spring in "crafting" its bid by providing it help not afforded to other bidders; that the receiver concealed information from the court regarding bids submitted by other bidders; that adjustments in the sales contract between the receiver and Spring were unwarranted; that the second and third rounds of bidding were too hasty; and that the sale price ultimately fixed for the stations was too low in light of earlier appraisals.

These objections are answered in the district court's lengthy opinion approving the sale. The objections turn on the specific facts and the district court's opinion is reported. In each case, we think that the district court's discussion is sufficient and that no error occurred. In our view, the district court and the magistrate judge have done a very able job in handling this complex and contentious case.

Affirmed.

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ERRATA SHEET

The opinion of this Court, issued on September 24, 1996, is amended as follows:

On page 8, 2nd line of footnote 2, add comma after "*cert. denied*".

On page 15, 1st line of indented quote, replace "there" with "[T]here".

On page 16, 1st full paragraph, line 10, replace "(1990);" with "(1990)." and delete *"Restatement (Second) of Contracts."*.

On page 19, 2nd full paragraph, line 2, replace "trustee" with "trustees".

On page 22, line 1, replace "F. Suppp" with "F. Supp.".

On page 22, lines 7-8 of 2nd paragraph, delete "The borrowers apparently did not even cross-examine Zitelman on this issue."

On Page 23, line 6 of 1st full paragraph, underline "Code of Conduct for United States Judges" and delete comma after "Judges".

United States District Court
District of Massachusetts

Civil Action
No. 94-12385-NG

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H&D BROADCASTING LIMITED PARTNERSHIP,
H&D MEDIA LIMITED PARTNERSHIP,
H&D RADIO LIMITED PARTNERSHIP, AND
H&D WIRELESS LIMITED PARTNERSHIP,
DEFENDANTS AND COUNTERCLAIM PLAINTIFFS,
v.
PNC BANK, OHIO, N.A.,
CHARLES E. GIDDENS, INDIVIDUALLY, AS RECEIVER
AND AS GENERAL PARTNER OF
MEDIA VENTURE PARTNERS,
ADDITIONAL COUNTERCLAIM DEFENDANTS.

MEMORANDUM AND DECISION
APRIL 9, 1996

GERTNER, D.J.:

I. INTRODUCTION

This court has been asked to approve the sale of the assets of a receivership.[1] The estate is comprised chiefly of four

[1] Sale proponents are plaintiff and counter-claim defendant Fleet National Bank ("Fleet"), counter-claim defendant P.N.C. Bank, Ohio N.A. ("PNC"), and counter-claim defendant Receiver Charles Giddens. Sale

radio stations, which, prior to court appointment of a receiver, were owned and operated by the defendants and counter-claim plaintiffs.

The proposed sale has been repeatedly scrutinized by the market, by interested parties and by the court. It has been the subject of three competitive bidding processes and a magistrate judge's careful monitoring, during which the relevant parties were given an opportunity to object to sale procedures and substance, and through which, where appropriate, the procedures adopted came to reflect the concerns of the parties.[2] A clear choice among possible purchasers has emerged, a choice endorsed by those who have the most to lose: the debtors' chief creditors.

Nevertheless, defendants challenge the sale, focusing chiefly on three points: first, that the court-appointed receiver, with notice to all concerned and with court approval, engaged the brokerage firm in which he was a principal to assist in the sale; second, that one of the proposed purchaser's principals, at the time the initial bid was submitted, was a partner in an accounting firm which was providing basic services to the receivership estate; and third, that the terms of the sale, again with notice and with court approval, were amended at various stages in the sales process.

From these facts and others, defendants argue that the sale is so tainted that it should not be confirmed.

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opponents are defendants and counterclaim plaintiffs H&D Entertainment, and its affiliated group of corporations and partnerships that are licensees, of, or have an ownership in, the radio stations which are the assets of the receivership estate (hereinafter "H&D" or the "Borrower Group").

[2] In accordance with 28 U.S.C. § 636 and the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, I referred this case to Magistrate Judge Karol for oversight of all procedural proceedings prior to sale confirmation and for reports and recommendation with respect to certain dispositive pre-sale motions.

I disagree. For the reasons set forth below, I ALLOW the Receiver's sales motion, as detailed in his November 30, 1995 submission.[3]

II. Statement of Facts

A. *Background*

Defendants are members of an affiliated group of corporations and limited partnerships that are licensees or have ownership interests in radio stations in various cities in the United States ("H&D" or "The Borrower Group").[4]

From September of 1983 to May of 1988, Fleet and PNC entered into a series of agreements with defendants to provide

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[3] The Receiver's sales motions include: Receiver's Motion to Authorize Sale of Receivership's Assets to Spring Broadcasting, L.L.C. or to a Qualified Second Round Bidder Free and Clear of Liens, Claims, Encumbrances and Interests with all such Liens, Claims, Encumbrances and Interests Attaching to the Proceeds of Sale in the Same Order and to Authorize the Assumption and Assignment of Executory Contracts filed with this Court on August 29, 1995, as modified by the Receiver's Motion to Approve Assumption, Assignment and Amendment of Local Management Agreement for Radio Station WKOE in Atlantic City, to Approve Waiver of Material Adverse Change Clause and to Authorize Entry into the Consulting Agreement filed with this court on November 13, 1995, and subsequently modified by the Receiver's Motion to Approve Modification of the WKOE LMA, Second Amendment to Radio Station Asset Sales Agreement and to Authorize Notice and Counteroffer Procedure Respecting Same filed with this Court on November 30, 1995.

[4] Defendant H&D Entertainment, Inc., f/k/a Dover Broadcasting, Inc., with its principal place of business in Connecticut, operates radio stations WBSM-AM in New Bedford, Massachusetts, and WFHN-AM in Fairhaven, Massachusetts (the "Entertainment Stations"). Defendant H&D Management, Inc. ("Management") is the general partner of H&D Wireless Limited Partnership ("Wireless"), H&D Broadcasting Limited Partnership ("Broadcasting"), H&D Radio Limited Partnership ("Radio"), and H&D Media Limited Partnership ("Media"). Wireless operates radio station WSUB-AM and WQGN-FM in Groton, Connecticut. Broadcasting operates the radio stations WFPG-AM and WFPG-FM in Atlantic City, New Jersey. Radio operates radio stations WRKS-AM and WXKLC-FM in Waukegan, Illinois. (Collectively, the Radio Stations, the Entertainment Stations, the Broadcasting Stations, and the Wireless Stations will be referred to as the "Radio Stations" or "Stations.")

revolving credit and term loans, secured by the Borrower Group's interests in the Radio stations and other assets.

The loans went into default. On February 2, 1994, Fleet notified the Borrower Group that it was accelerating its obligations and demanding payment in full. After defendants failed to pay the amounts due, on February 10, 1994, Fleet began actions against H&D, its members, and their personal guarantors, seeking to recover the outstanding balances.

Fleet, PNC and the Borrower Group entered into a settlement agreement. In exchange for the Banks' forbearance of the debt, the Settlement Agreement set forth a schedule for liquidation of certain assets and for repayment of amount owed.[5] The Agreement also gave the Banks the right, if the Borrower Group defaulted on its obligations, to have a receiver appointed to oversee the liquidation of H&D's assets.

On November 30, 1994, the Borrower Group failed to meet its obligations under the Agreement.[6]

B. *Court-Appointed Receivership*

On December 2, 1994, Fleet filed a complaint seeking to recover the more than $12.9 million which defendants owed Fleet pursuant to certain promissory notes and guarantees. Fleet also sought *ex parte* appointment of a receiver to take possession, manage, operate and, subject to court approval, sell the Radio Stations.

On December 5, 1994, after an *ex parte* hearing, this Court allowed plaintiff's Motion[7] and appointed Charles E. Giddens

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[5] For a more complete discussion of the terms of the Agreement, *see* Report and Recommendation Regarding Defendants'/Counter-claim, Plaintiffs' Motion for Partial Summary Judgment (Docket No. 50) and the Banks' Cross-Motion for Summary Judgment (Docket No. 59) (July 11, 1995), adopted by this Court on October 25, 1995.

[6] *See*, Report and Recommendation, *supra*, at 17-21.

[7] Fleet's Ex Parte Motion for the Appointment of a Receiver and its Motion for an Expedited Hearing emphasized the amount owed Fleet from the H&D Borrower Group, that "the receiver [was] necessary (i) to preserve the status quo and ensure that those assets or funds which are or will be in the possession, custody or control of the H&D Borrower Group will be made secure; and (ii) to provide the means for the liquidation of the assets

as Receiver.[8] Giddens was ordered to take possession, to operate and then, subject to court approval, to enter into a Purchase and Sale Agreement, to sell and to transfer the assets of the Borrower Group.

As was fully disclosed to this Court, Giddens was a principal in Media Venture Partners ("MVP"), a brokerage firm specializing in the radio industry. H&D had previously engaged

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of the H&D Borrower Group as a going concern in the most commercially reasonable manner possible." *See* Plaintiff's Ex Parte Motion for the Appointment of a Receiver, at ¶ 3.

Fleet also noted the following in its December 1994 submission: Through the affidavit of its Vice President, David Lechner, Fleet made the court aware that certain principals of the H&D Borrower Group had threatened simply to "disappear," rather than cooperate with the sale of the stations. Lechner, in his affidavit, recounted a conversation with one of the H&D Borrower Group's principals, Joel Hartstone. According to the affidavit, "Hartstone indicated that [the principals' personal] tax liability would be approximately 40% of the difference between the aggregate sales price of the Stations and $9 million to $9.5 million. He stated that in light of the H&D Borrower Group's total long term debt of approximately $14.3 million, [the principals] would need to sell the stations for more than $17.9 million before they would realize any benefit after meeting their personal tax liabilities. . . . Accordingly, Mr. Hartstone stated, he has a strong incentive for the value of the stations to be lower (at least down to their tax basis [of about $9 million with respect to the stations]) rather than higher if they are not liquidated for at least $17.9 million." *See* Affidavit of David T. Lechner (Dec. 2, 1994), at ¶ 12; *see also, e.g.*, Affidavit of Gregory C. Harbaugh (Dec. 30, 1994), at ¶¶ 6-10 (statement of a Vice President of PNC Bank with respect to H&D's valuation of the assets at $9 million at October 31, 1994 meeting); Affidavit of Dorene M. Conlon (Dec. 27, 1994), at ¶¶ 3,4 (reporting that at a meeting on October 31, 1994, Hartstone indicated that he would "walk away" from the Stations if the lenders insisted on quick liquidation).

[8] I agreed with the Banks recommendation of Giddens as receiver. According to Giddens' testimony, which I credit, on or about December 1, 1994, the Banks' counsel invited at least four industry experts to bid for the position of receiver, requesting initially that they submit proposals "blind" to the exact identity of the assets. The Banks ultimately settled on Giddens. Plainly, the process was intended to satisfy the Banks' interest in finding an expert who would maximize the value of the assets and the sales price, providing quality services for the most reasonable fees.

MVP to broker the sale of the Radio Stations.[9] Specifically, Randall Jeffery, a principal in MVP, had served as H&D's exclusive broker from February 1, 1994 to December 1, 1994, on which date he resigned.[10] Jeffery resigned primarily because he believed that the H&D Borrower Group was demanding prices that were incompatible with conditions in the marketplace. *See* Affidavit of Randy Jeffery (Feb. 27, 1995), at ¶ 1.[11]

On December 16, 1994, defendants moved to vacate the order appointing a receiver. On January 3, 1995, after the Federal Communications Commission (FCC) approved the transfer of licenses to the Receiver,[12] defendants moved to withdraw their motion to vacate the appointment order, without prejudice to their claims against Fleet. I allowed defendants' motion to withdraw on January 17, 1995.[13]

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[9] The principal business of MVP is to provide brokerage, appraisal and consulting in the radio broadcasting industry. As of December of 1994, MVP had sold over $600 million work of radio and television broadcast properties for the year of 1994 alone. *See* Affidavit of Charles E. Giddens (Dec. 5, 1994), at ¶ 1.

Giddens has over thirty-five years experience in the industry. In addition to consulting, he has owned or managed 44 radio stations. Giddens had been appointed by federal courts to serve as receiver for radio stations before, each time with his brokerage firm serving as broker. The Federal District Court had appointed him in 1991 as Receiver for assets which included a radio station in Richmond, Virginia. In 1992, the Federal District Court had appointed him to served as receiver of assets for a radio station in Birmingham, Alabama. In each case, MVP served as the broker for the receivership estate.

[10] Jeffery had announced his resignation on October 31, 1994.

[11] Neither Giddens nor Jeffery had knowledge of Fleet's intention to seek receivership for the radio stations at any time prior to December 1, 1994.

[12] Over objections of the defendants, the FCC approved the assignment of the licenses to Charles E. Giddens as Receiver on December 19, 1994.

[13] To be sure, defendants repeated their concerns about the fact that a receiver was appointed (an issue resolved at summary judgment), as well as about the particular person appointed in a number of pleadings after that date. On January 24, 1995, the H&D Borrower Group and its former management filed an Answer, Counterclaim and Jury Demand in which H&D has sued not only Fleet and its participant, but also, Giddens as Receiver and individually, and his brokerage firm, MVP. On June 20, 1995, defendants pressed for removal of the Receiver of grounds of conflict of

1. *The Zitelman Group's Duties*

On January 20, 1995, Giddens retained the Zitelman Group, Inc. (TZG) to provide certain accounting services for the receivership estate.[14] Although TZG offered a wide range of services, the Receiver only engaged TZG in a limited capacity, hiring the firm to perform certain ministerial accounting functions.[15] TZG was engaged to prepare consolidated monthly financial statements and provide some routine services with respect to payroll taxes, such as reconciling the tax filings with payroll registers and weekly pay checks.

The work was performed by Stewart Bassin. TZG did not have access to the raw financial data of the Radio Stations. For instance, in preparing the consolidated financial reports, TZG was given statements from each station which it then reformatted for the general report. Overall, TZG received monthly balance sheets, income statements, and general ledgers, as well as weekly cash reports and, in some instances, information on accounts receivable and payable.

In reviewing the testimony, I find that TZG did not advise the receivership, provide financial audits, or direct investment of assets, with respect to the Radio Stations; nor did it participate in management decisions with respect to the operation of the Radio Stations or get involved in the MVP's sales efforts.

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interest, charging specifically that his services as broker for another client created a conflict with the receivership estate. On July 20, 1995, the Magistrate Judge denied defendants' motion without prejudice.

[14] The Receiver was clearly within his authority to employ and fix the compensation for the services TZG performed. *See* Order Appointing Receiver (Dec. 5, 1994) at 1(a). After being appointed receiver, Giddens called Zitelman to ask him if he would be interested in providing some accounting services to the receivership estate. Zitelman then submitted a formal proposal to Giddens on January 13, 1995. After discussing the terms of the engagement, TZG was engaged by the Receiver on January 20, 1995.

[15] I credit Zitelman's testimony with respect to the character of the services rendered. When asked by defendants' counsel at deposition whether he would describe TZG's functions as "acting as an outside CFO for the receivership," Zitelman responded that the function was "more like a bookkeeper." *See* Zitelman Dep. (Sept. 15, 1995) at 18.

2. *MVP as Broker*

On February 3, 1995, the Receiver, with notice and full disclosure to this court of his interest in MVP, requested court approval to employ MVP as broker for the sale of the Radio Stations. Giddens reasonably recommended a broker familiar with the operation, programming and performance of the Radio Stations. In addition, because MVP offered the receivership estate a special commission arrangement, its brokerage services were provided at no actual additional cost to the estate.[16]

On March 9, 1995, after a conducting a hearing with respect to this and other issues, the Magistrate Judge approved the employment.[17]

C. *Bidding Processes*

1. *First Round Bidding*

a. *General Process*

On March 16, 1995, MVP, acting as broker on behalf of the Receiver, distributed about 200 offering presentations to potential bidders containing descriptions of: the stations' operations, their programming, their market and financial performance. All the information was current through January 20,

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[16] Jeffery testified that he discounted his commission. Additionally, had the estate engaged another broker, it might have faced paying a double fee. Under H&D's 1994 brokerage agreement with Jeffery, if, after MVP's resignation, another broker had sold the stations to one of the prospects originally approached by Jeffery, Jeffery might have been entitled to the commission.

[17] Before the Magistrate Judge, defendants objected to MVP's appointment, making a rather tortured argument that MVP, who would be paid by commission (at a reduced rate), would engage in a "fire sale," and that they were not appropriate for the task. This second argument was particularly incredible given MVP's prior relationship with the H&D Borrowers' Group and MVP's obvious investment in selling the assets for the highest price possible.

Defendants never requested reconsideration of the Magistrate's ruling before this Court. Notwithstanding the fact that they may have waived this issue as a legal matter, I find that there is no factual support for their allegations with respect to MVP's qualifications or efforts.

1995. After the initial presentation, MVP mailed a supplement to each potential bidder, including each Station's current financial statements from the most recent reporting period.[18]

In addition, MVP mailed over 600 letters of inquiry to prospective bidders identified through MVP's data base. The letters included information about the first round bidding process and a sample bid form. Finally, MVP announced the sale in a press release published in industry trade publications.

The bidding materials notified potential bidders that all bids would be subject to due diligence, the negotiation of a purchase and sales agreement, and, ultimately, court approval.[19]

b. *Spring Group's Bid*

During the period between the announcement and the bid deadline, Jeffery sent bid packages to, and discussed the sale with, any interested potential bidders, among them the Spring Group, L.L.C. ("Spring"), an entity in which Zitelman is a principal.

Defendants have made, essentially, three allegations with respect to the preparation of the Spring bid: first, that Zitelman tried to conceal his interest in the bid Spring submitted; second, that the Spring bid was based on inside information; and third, that Giddens, Jeffery and Zitelman were

[18] Defendants charge that materials sent out were inadequate, because the packages did not contain completely current information. I credit Jeffery's testimony with respect to this issue. He acknowledged that the offering brochures "were not distributed to interested parties immediately after they were prepared," but indicated credibly that "the delay was solely the result of the Borrower Group's opposition to the appointment of MVP as broker. Distribution was also delayed by the Borrower Group's unwillingness to supply information to the Receiver upon his appointment. In all cases, the brochures were updated by supplying interested parties with supplemental information regarding the receivership assets." *See* Affidavit of Randall E. Jeffery (April 25, 1995), at ¶ 1.

[19] In the first round bidding materials, the Receiver reserved the right to forego entering into a purchase and sales agreement in the event that no acceptable bid was received pursuant to the first round bidding process.

somehow colluding to their personal advantage and to the detriment of the receivership estate.

After weighing the testimony before me, and particularly reviewing the able cross-examination of witnesses Zitelman, Jeffery and Giddens, I find defendants' allegations without merit.

First, Zitelman plainly did not try to conceal either his interest in bidding or his role in Spring. For instance, when he became interested in submitting a bid, he first asked the Receiver and Jeffery whether it would be appropriate for him to do so.[20] Once Giddens gave him the go-ahead, Zitelman made inquiries, formally requested and then received the bidding package, and only then submitted a bid — on the Zitelman Group's letterhead.[21]

Second, there is simply no evidence that Zitelman used inside information to shape his bid.[22] To the contrary, the information to which Zitelman had access through TZG would have been wholly insufficient to put together the bid. As Zitelman testified, without the information in the books distributed to interested bidders (for which he specifically asked after being told that he could bid on the assets), he would not have been able to determine whether or how much to bid.[23]

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[20] Zitelman notified the Receiver of his interest in bidding on the Stations and asked whether it would be appropriate. Giddens then sought advice of counsel. Ultimately, Giddens gave Zitelman permission to bid. Nothing in this factual scenario indicates a subversion of the bidding process. It suggests, instead, a concern for appropriate delineation of roles inconsistent with defendants' allegations.

[21] Defendants have repeatedly charged that Zitelman's interest was purposefully concealed. As support for that allegation, they note the absence of Zitelman's personal *curriculum vitae* from the April 13, 1995 bid. Had this been more than simply an oversight, it surely would not have been corrected one day later, when Zitelman's *curriculum vitae*, detailing his business interests, was sent via facsimile to Randall Jeffery at MVP.

[22] At most, Spring had access to some weekly financial information that all bidders received in a timely fashion via bid supplements.

[23] At the November 3, 1995 hearing before this Court, Zitelman testified credibly that Spring could not responsibly have relied, in preparing its bid, on the information to which Zitelman had access because of TZG's services.

Nor does the evidence bear out the third charge.[24] Jeffery supplied Zitelman with the same bid form as other bidders; he gave Zitelman the same general statement about his sense of the assets' value. In sum, Jeffery did not give Zitelman any information that was not given or available to other bidders.

By its deadline of April 13, 1995, MVP had received twenty-four first round bids for the Radio Stations. Giddens and Jeffery determined that Spring submitted the highest qualified bid, in the amount of $14,626,000, plus an amount equal to 80% of the face amount of current accounts receivable, amounting to a total purchase price of about $15,300,000.

With respect to this decision, defendants argue that the Receiver misled the court by characterizing the Spring bid as the highest and most qualified, so that he could sell the estate's assets to Zitelman. As support for this charge, defendants point to a misstatement of the Receiver's counsel at a hearing before the Magistrate Judge on May 3, 1995, indicating that Spring's first round bid was $1 million better than the next bid.[25] From this statement and other facts concerning Spring's financing, defendants argue that the Spring bid was precarious, and that it was not the highest qualified bid. I reject these contentions.

Zitelman explained that he needed to look at the books sent out by MVP. In particular, he needed to examine: past financial history; market overviews; Arbitron ratings; lists of assets, of employees, and programming formats for each station; the competition in each market; the frequencies; the classification of stations; contracts; leases; general information on the history of the stations; as well as copies of coverage maps, detailing the listening area of the stations. As Zitelman stated, and I credit, this information became available to him once he became a potential bidder and was central to Spring's crafting of its bid.

[24] I credit Jeffery's testimony in this regard.

[25] As the Receiver's counsel acknowledged at a later hearing, counsel's statement did not reflect that other bidders had handled the issue of accounts receivable differently, with some leaving the accounts receivable out of their bids and for collection by the estate, and others including accounts receivable. The next best bid, for example, did not include accounts receivable.

Clearly, the bids submitted offered different terms and would accomplish the goal of liquidation of all the assets in different ways. This Court had charged the Receiver with the task of comparing bids across these differences, assessing the financials of each bidder, and recommending that the sale move forward with a commercially reasonable bid — or bids — that served the best interests of the estate.

I find that the Receiver discharged his duty reasonably and without fault. Despite defendants' contentions to the contrary, compared on an "apples-to-apples" basis, the second best bid was still $300,000 less than Spring's. In addition to the advantage in terms of dollars offered, other factors weighed in favor of Spring. For instance, the second best option required aggregating two entirely separate bids. Had the Receiver chosen that option, the work of — and cost associated with — liquidating the assets would have considerably increased. The Receiver would have been required to negotiate two separate purchase and sale agreements; he would have been required to oversee two separate due diligence investigations; and he would have been required to ensure that two separate purchasers could each obtain financing. In addition, the risk that the entire sale could be derailed would have been heightened, had a problem arisen with either of the two bidders. For all those reasons, the Receiver's determination that the Spring bid was the highest was clearly reasonable.

Defendants also argue that the Receiver's conduct in determining the highest bidder demonstrated an effort on the part of Giddens to conceal Zitelman's interest in the Spring bid. The evidence simply does not bear out this allegation.

The relationship between Spring, Zitelman and the Receiver was disclosed to defendants[26] and to the court in an

[26] On May 12, 1995, the Receiver sent to defendants, via counsel, copies of monthly financial statements bearing the name of The Zitelman Group as preparer. Such conduct is plainly inconsistent with attempts to conceal the bidder's role with respect to the receivership estate.

affidavit filed by the Receiver on May 25, 1995.[27] The matter was discussed during a hearing conducted by the Magistrate Judge on that date. The Magistrate Judge appropriately determined that the sales process should move forward, that the sale opponents should be given full opportunity to depose Zitelman with respect to his relationship to the receivership and the bidding process, and that the issue would be reserved for the hearing on the confirmation of the sale, after defendants had been given the chance to explore their concerns.[28] Furthermore, effective June 19, 1995, after Spring had submitted its bid but prior to the negotiation of a purchase and sale agreement, TZG resigned as the Receiver's accountant.[29] Finally, while the sale opponents have persistently charged that Zitelman continued to work for the Receiver and enjoy access to confidential information with respect the receivership estate, their allegations are baseless.

c. *Negotiation of the P&S*

Once it was determined that Spring was the highest first round bidder, Spring requested and received ongoing financial information regarding the Radio Stations. Spring also requested and was granted, permission to speak directly with station managers and personnel. The information and access provided to Spring was entirely reasonable and proper; it was also available to other prospective purchasers so that they

[27] There is ample evidence that Giddens discussed the matter with counsel no later than April 18, 1995, seeking guidance on whether Zitelman's role with respect to the receivership estate presented a conflict of interest.

[28] The Magistrate Judge authorized defendants to depose and seek extensive documents from Zitelman — on this occasion and again on November 3, 1995. In addition, he also permitted deposition of Spring's financiers to explore the charge that they backed Zitelman's bid because he was, allegedly, an insider. Having reviewed the testimony, I find that there was no evidence of inside information or of any attempts to trade on what defendants contend was Zitelman's inside status.

[29] According to credible testimony before this Court, Giddens requested that Zitelman resign before the two engaged in earnest in negotiations. Zitelman agreed.

could participate on an equal basis in the second round bidding process.[30]

After substantial negotiations, Spring and the Receiver proposed a Purchase and Sale Agreement on July 31, 1995 for court approval.[31] The Radio Station Asset Sales Agreement (the "P&S") set forth specific terms for the sale of the receivership's assets and made some modifications on the initial bid. In particular, the adjusted purchase price was set at $13,976,000, exclusive of accounts receivable, reflecting arms length negotiations between the Receiver and Spring and the need to correct physical deterioration at the Stations discovered during Spring's due diligence.[32] Additionally, a "Material Adverse Change Clause" was included in the P&S, under which Spring would have the right to terminate the agreement if certain adverse changes in the performance or rating of the Radio Stations occurred prior to closing. Finally, in anticipation of an appeal of any order of sale from this Court, the P&S also provided for a local management agreement from the date of court approval of the sale forward for a period not to exceed nine months, during which time the successful bidder would waive the Material Adverse Change Clause, would manage the stations for 30 percent of the net operating profits of the stations, and the Receiver would,

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[30] I credit Zitelman's testimony before this Court in this regard. He testified that the information on which he relied in securing financial backing was not gleaned from the information to which TZG had access during its limited engagement, but rather came from the information he received as a potential bidder and through his own due diligence.

[31] After the July 31, 1995 hearing, clarifying amendments were proposed, dated August 1, 1995.

[32] The Purchase and Sale Agreement provided for a purchase of all of the Radio Stations, excluding accounts receivable, for a price of $14,126,000 less $150,000 in credits for a net purchase price of $13,976,000. In addition, Spring agreed to purchase the net accounts receivable represented on the Accounts Receivable Aging in the Current 30, 60, 90 day columns excluding barter receivables, for 80% of the total outstanding balance of the net accounts receivable as of the date of the closing.

however, maintain two employees to oversee the operations, as required under FCC regulations.[33]

One other aspect of the Purchase and Sale Agreement bears mentioning: The initial bidding materials had given potential purchasers the option to assume freely certain of the estate's executory contracts. In the P&S, Spring had done so, with an exception. One contract Spring did not assume was the Local Management Agreement ("LMA"), between defendants and Ocean Communications, pertaining to WKOE, a radio station in Atlantic City.[34] The LMA for WKOE, essentially, permits the owners of WFPG[35] to operate WKOE, using WFPGs facilities and equipment in exchange for a monthly fee.[36] Zitelman did not assume the LMA for WKOE, believing the monthly fees to be excessive.[37]

While the LMA was not assumed, Spring agreed to purchase all of WFPG's equipment, as well as other proprietary assets necessary to operate WKOE. As Zitelman testified, Spring believed it could choose to assume the contract at a later date, if it succeeded in negotiating for terms more in line with market rates.[38]

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[33] The P&S was the subject of a lengthy hearing before the Magistrate Judge on July 31, 1995, during which objections were heard, and the Banks endorsed the proposed Agreement.

[34] At the time the receivership assets went out to bid, the Receiver had neither assumed nor rejected the LMA with respect to WKOE. It was his belief, which I find both reasonable and credible, that the terms of the LMA were substantially in excess of prevailing market rates, and that it could be renegotiated with Ocean Communications once a potential purchaser had been identified.

[35] WFPG-AM/FM is an Atlantic City Radio Station in the receivership estate.

[36] All assets associated with the programming and operation of WKOE, except the broadcast tower, transmitted and broadcasting license, are owned by the receivership estate and are part of WFPG in Atlantic City.

[37] Zitelman's view has been supported by industry expert Robert Maccini, who described the monthly fees in the original LMA as "onerous," at a hearing before this Court on November 3, 1995.

[38] I credit Zitelman's testimony with respect to this issue. On January 19, 1996, Zitelman testified that Spring had determined its bid price based on the premise that Spring could acquire the WKOE/LMA, believing that the

d. *Second Round Bidding*

On April 20, 1995, the Receiver had requested that the court approve certain bidding procedures for the sale of the estate's assets, including a second round bidding process. The Receiver proposed that the successful first round bid(s) be subjected to counter-offers in a second round overbidding process, in order to maximize the value received for the estate. Concerned that such a second round would chill the interest in bidding initially, the Receiver also suggested that prospective first round bidders be offered break-up fees and overbid protections, designed to cover the costs of a first-round bidder's efforts in the event that, in the end, the stations are sold to another potential purchaser.

On August 4, 1995, following five days of hearings, the Magistrate Judge adopted the Receiver's recommended procedures. As provided in the P&S, Spring delivered a deposit of $1,412,600, on August 22, 1995. Thereafter, on August 29, 1995, the second round bidding process was set in motion, with the P&S negotiated with Spring serving as the first round bid against which subsequent bids would be tested.

MVP, again acting as broker for the Receiver, distributed notice of the second round bidding procedures to all the unsuccessful first round bidders, as well as to others who had expressed an interest in the Radio Stations but who had not submitted a bid in the first round. Among other things, the notice (1) described the bidding process; (2) included copies of the Agreement entered into between Spring and the Receiver in July of 1995; and (3) invited potential bidders to call the broker with any questions with respect to filing competing bids for the stations. MVP also mailed potential bidders updated offering presentations and arranged for broader

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contract would be freely assumable and that it would be desirable if the terms could be renegotiated. Zitelman testified that he discussed the WKOE/LMA with the Receiver during the first round of negotiations and prior to signing the initial purchase and sale agreement, and that he agreed that he and the Receiver could negotiate with Ocean Communications after signing the P&S.

notice about the bidding process, including publication of second round bidding procedures for a period of two weeks in the two widely read industry publications.

The materials fairly identified the condition and performance of the Radio Stations.

The court initially set October 6, 1995 as the deadline for completion of due diligence by second round bidders and October 16, 1995 as the deadline for submission of qualified second round bids. On a motion of the Receiver, the court extended the due diligence period until October 11, 1995, specifically to accommodate the due diligence of one second round potential bidder, which had initially submitted a second round bid in the amount of $15,500,000. On a subsequent motion of defendants, this court agreed to hear evidence of and consider other bids during the scheduled hearings to confirm the sale.

No second round bid was submitted.

On October 27 and November 3, 1995, this court held evidentiary hearings with respect to the Receiver's motion to sell the receivership assets to Spring pursuant to the Radio Station Asset Sales Agreement entered into on July 31, 1995, as amended on August 1, 1995.

At the October 27 hearing, counsel for the Receiver brought to the attention of the Court and defendants a letter setting out two nascent agreements between the Receiver and Spring: the first, an agreement in which Spring would waive the Material Adverse Change Clause in the initial Purchase and Sales Agreement in exchange for assumption of an amended LMA for WKOE, and the second, a proposed Consulting Agreement. As to the agreement to waive the Material Adverse Change Clause in exchange for assumption of an amended LMA for WKOE, the Receiver explained that he was concerned that events could trigger the Material Adverse Change Clause and that he wanted to negotiate to rid the agreement of that possibility. The amended LMA, permitting the purchaser of WFPG to operate WKOE for fees more in line with market rates, had potential value to the owner of

WFPG and therefore provided a fair exchange. As to the proposed Consulting Agreement, the Receiver testified that in the normal course of purchasing assets, potential buyers often enter into local marketing agreements (LMAs), essentially leasing the properties during the period between the closing of the transaction and the approval by the FCC of a transfer of license (as they had initially agreed to do in this case). However, the Receiver had come to believe that such an agreement would grant him inadequate control over the properties. Hence, he proposed elimination of the initially agreed to LMA and, as its replacement, a consulting agreement in which the successful bidder would have certain rights to operate the Stations, although the Receiver would retain full management control and hold over the assets, the licenses, and so forth. As to the reasoning for both proposals, I credit Giddens' testimony.[39]

Evidence with respect to the value of the Radio Stations was also presented. It was Robert J. Maccini's uncontradicted testimony that the fair market value of the Radio Stations as of July 31, 1995 was $13,325,000.[40]

One other point was undisputed: that the principal, interest and costs owed to the Banks were — even at that stage — well in excess of the sales price offered by Spring.[41]

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[39] These proposed changes were the result of ongoing negotiations which reflect the Banks' and the Receiver's attempts to hedge against all unnecessary risks to the estate. In addition, particular changes expressly responded to concerns raised by defendants counsel during hearings in July and August of 1995.

[40] The P&S dated July 31, 1995, as amended on August 1, 1995, provided for a purchase price of $13,976,000, or $651,000 more than the Stations fair market value at the time the parties entered into the agreement.

[41] It is undisputed that defendants have not paid any interest on their debt to the Banks since before the court appointed a receiver and that additional unpaid interest on the principal continues to accrue every month.

e. *Proposed Assumption of an Amended WKOE/LMA; Waiver of the Material Adverse Change Clause and Consulting Agreement*

On November 13, 1995, the Receiver filed a formal motion requesting that the court approve three changes in the overall agreement between Fleet and Spring: approval of an amended WKOE/LMA and the assumption of that contract by Spring; the award of a consulting agreement to Spring; and, in consideration for the WKOE/LMA, Spring's waiver of the material adverse change clause which had been part of the July 1995 purchase and sale agreement. The Magistrate Judge conducted a hearing with respect to this motion.

Defendants argued that Spring's waiver of the Material Adverse Change Clause was inadequate consideration for the Amended LMA and the consulting agreement. Sale proponents argued, on the contrary, that conditions were dangerously close to permitting the purchaser to opt out of deal because events might trigger operation of the Material Adverse Change Clause; that waiver of the clause had substantial value to the estate and that the exchange was a fair one, in the best interests of the estate.

Defendants made another argument: that all prospective bidders should have the opportunity to submit new bids in light of this change in the terms of the Spring P &S, and, in particular, in light of the fact that the WKOE/LMA had substantial value.

f. *Putting Amended Terms Out to Public Bid*

Significantly, the Banks and the Receiver agreed. On November 30, 1995, the Receiver moved to initiate a *third* round bidding process not previously contemplated by the parties, to give any interested bidders an opportunity to bid on the amended terms. In this third round, the amended Purchase and Sale Agreement, including the proposed assumption of the renegotiated WKOE-LMA, the waiver of the Material

Adverse Change Clause, and the Consulting Agreement between Spring and the Receiver, would be tested against the bids of any other interested purchaser.

2. *Third Round Bidding*

The Magistrate Judge granted the Receiver's motion and initiated yet another round of bidding. After notice and court approval, new materials were prepared.[42] On December 8, 1995, notice of the third round bidding process and up-to-date information was mailed out to approximately 750 potential bidders. Since Arbitron ratings would be reported in early January, the Magistrate Judge set a new bidding deadline of January 12, 1996, to give potential bidders time to analyze the new information before submitting a bid.

Defendants contended that the bidding process was defective, that all terms were not reasonably put out to bid, and that, in any case, the period for bidding was unconscionably short.

Having reviewed both the argument of the lawyers and the testimony presented on this issue, I find that the bidding procedure was reasonably calculated to invite bids and was executed without fault.

No third round bids were submitted.

On January 19, 1996, this court again held an evidentiary hearing with respect to the Receiver's motion to approve the Amended Purchase and Sale Agreement between Spring and the Receiver.[43] At the hearing, defendants failed to produce

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[42] Defendants have argued that one aspect of the P&S could not be bid on by others: the amended LMA, a contract signed by the Giddens as Receiver, Zitelman for Spring, and Koplovitz, for Ocean Communications. I disagree. Based on the terms of the notice and Giddens' testimony, I find that it was reasonably clear that this contract could be assumed by any purchaser.

[43] By this time, there was a serious question as to whether a material adverse change had indeed occurred that would permit Spring to withdraw from the deal if it did not waive its right to do so. In a letter dated January 4, 1996, Spring asserted that in November events occurred which would trigger the Material Adverse Change Clause and permit Spring to walk away from the agreement without penalty — and with a total refund of its

any evidence of collusion between the Receivers and Zitelman or Spring, or any misuse of confidential information for the benefit of Spring.[44] Instead, evidence disclosed that negotiations between the Receiver and Spring had been conducted at arms length[45] and that the terms of the Amended Purchase and Sale Agreement are commercially reasonable as well as in the best interests of the receivership estate.[46]

It is worth noting that both the procedures used to sell the assets of the receivership and the proposed sale before this Court have been fully endorsed by the Banks, notwithstanding the fact that confirmation of this sale will leave the Banks with a deficiency. If there were alternative procedures or approaches that would have gone further to maximize the Banks' recovery, one might reasonably expect that they would have pressed for those alternatives. They did not.

At the conclusion of the testimony on January 19, 1996, I allowed the Receiver's motion to confirm the proposed sale of the receivership's assets to Spring. I also approved Spring's assumption of the amended LMA and the Consulting Agreement between the Receiver and Spring. My conclusions of law are set forth below.

$1.4 million deposit. The receivership would then be required to start the entire bidding process anew. While sale proponents have disputed Spring's characterization of the allegedly triggering events, the delay and difficulties involved in resolving the issue are beyond dispute.

[44] On motion of defendants, the Magistrate Judge granted continued discovery with respect to representations Spring might have made when securing financing, allowing defendants every reasonable opportunity to explore their concerns. Nothing improper was revealed.

[45] In this regard, I credit the testimony of two of the businessmen at the center of the sale: Charles Giddens, the Receiver, and P. Richard Zitelman, one of Spring's principals.

[46] According to Robert Maccini, who appraised the value of the Radio Stations, the original LMA may be considered an asset, valued at $267,287. As amended, the LMA has a value of $793,722. In particular, given the posture of this sale, I find exchanging the amended LMA for waiver of the Material Adverse Change Clause is certainly reasonable. As for the Consulting Agreement, I find that it too is prudent. The Receiver retains basic control of the assets during the pendency of any appeal but the designated purchaser may nevertheless be involved in the maintenance of the assets in question. The balance is an appropriate one.

III. Analysis

Defendants oppose the sale to Spring primarily on the basis of two alleged conflicts of interest: first, a conflict between Giddens, as Receiver, and Jeffery, as broker; and second a conflict between Zitelman, as a principal in the Zitelman Group performing services for the Receiver, and Zitelman, as a principal in Spring. In addition, they challenge certain specific actions of the Receiver and the purchaser, which they suggest are sufficiently suspect to undermine confirmation of the sale.

The sale proponents, the Receiver and the debtors' chief creditors, the Banks,[47] argue that this Court should confirm the proposed sale, that it is in the best interests of the estate, and that neither public policy nor established legal precedent prohibits it. They contend that a court-appointed receiver is vested with the equitable authority to sell property within the receivership to a good faith purchaser, where there is no evidence of fraud or improper use of confidential information. Spring, they assert, meets this standard.

I shall address the defendants' challenges to confirmation of this sale seriatim.

A. *Giddens as Receiver and Principal in MVP*[48]

Defendants argue that the Receiver's decision to employ his own brokerage firm, even though it was expressly disclosed to, and approved by, this Court, created a conflict of interest and violated Gidden's fiduciary duty of loyalty. They also contend that his other ongoing professional commitments created a conflict of interest which can only be remedied by denying confirmation of the sale.[49]

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[47] It should be noted that the Banks are not the estate's only creditors. There are many others, but — significantly — none has opposed the sale.

[48] As noted above, at the outset of the sales process, there was a challenge to the appointment of a receiver. That issue was resolved by this Court's decision on summary judgment.

[49] Defendants initially filed a Motion to Replace on Grounds of Conflict of Interest on June 21, 1995 before the Magistrate Judge. The motion was denied, without prejudice, on July 20, 1995. *See also* Defendants' Motion

Defendants' arguments are meritless.[50]

The appointment of a receiver is a matter resting within the sound discretion of the court. Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2983. The goal of a receiver charged with liquidating assets is to obtain the highest price available under the circumstances. *See Jackson* v. *Smith*, 254 U.S. 586, 588 (1921).[51]

It is axiomatic that receivers are bound by fiduciary obligations to the court appointing them and to the estates they serve. *See, e.g.*, Clark, TREATISE ON THE LAW AND PRACTICE OF RECEIVERS, 3rd Ed., I, § 11(a); *Powell* v. *Maryland Trust Co.*, 125 F.2d 260, 261 (4th Cir.), *cert. denied*, 316 U.S. 671 (1942).

In the case of a court-appointed receiver, those duties are framed by the task he or she is ordered to accomplish.[52] Where a receiver is charged with liquidating an estate's assets, he or she is not required to adhere to imprudent restrictions that would unnecessarily impede achievement of that goal. Nor is the court required to impose restrictions that would bar indi-

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for New Sale Procedure and Process and for Order Restraining Receiver and Broker from Communicating With Potential Buyers Prior to Court Order for Sale Procedure (June 27, 1995). The motion was never renewed before this Court. Accordingly, the only issue before the Court is whether the Receiver's alleged conflict of interest requires that the sale be avoided. As a general matter, courts have disfavored that result, instead surcharging, or denying compensation to, receivers and trustees whose conduct violated their obligations to the estates they were appointed to serve. *See, e.g.*, *Mosser* v. *Darrow*, 341 U.S. 267 (1951); *Phelan* v. *Middle States Oil Corp.*, 154 F.2d 978, 991 (2d Cir. 1946).

[50] Giddens' qualifications for this post are beyond dispute. His years of experience and his uncontroverted success as a broker in the broadcasting industry, as well as his prior service as a federal court-appointed receiver, suited him to serve as a receiver for an estate consisting principally of radio stations, and where the court's charge to the receiver is to liquidate the estate's assets.

[51] In managing the estate, a receiver is bound to proceed with ordinary care and prudence, that is, exercising the care and diligence with which an ordinary and prudent individual would use in handling his own estate.

[52] *See* Clark, RECEIVERS, Ch. II, § 43 & 43(a).

viduals experienced in an industry[53] or familiar with the estate's assets from serving as the estate's receiver or as an agent of that receiver.[54] This is true both under the law of equity receivership[55] and within the more rigid confines of the modern Bankruptcy Code.[56] *See, e.g., In re Automatic*

[53] Where the assets relate to a highly specialized industry, with its own licensing requirements, among other things, this concern is particularly pointed. Indeed, the licening requirements of the FCC with respect to radio stations give rise to a true need to have the process monitored by an industry expert and supporting professionals. *See, e.g., Arose* v. *Federal Communications Commission*, 494 F.2d 1145, 1148 (D.C. Cir. 1974) ("The Commission's regular practice is to approve an involuntary assignment of the license to a receiver in bankruptcy, who must then find a qualified purchaser and structure the sale in compliance with the mandate of Second Thursday [designed to minimize profit by the bankrupt parent-licensee].")

[54] As a general rule of receivership law, a receiver's interest in the subject matter or relationship to one of the parties does not automatically require his removal. *Lincoln Printing Co.* v. *Middle West Utilities Co.*, 6 F.Supp. 663 (N.D. Ill. 1934), *aff'd*, 74 F.2d 779 (7th Cir. 1935); *see also* 75 C.J.S. § 99 ("[W]here objections do not go to his entire want of capacity or disqualification, his mere interest in the subject matter or relationship to the parties will not absolutely require his removal; nor will a receiver who is competent, efficient, and impartial be removed merely because he is objectionable to one of the parties, or for other reasons which, under the particular circumstances, do not affect the proper performance of the duties of the office, or involve a loss, or danger of loss, to the receivership property or funds").

[55] Disinterestedness within the context of receivership law has traditionally required that a receiver not have a direct interest in the estate. However, the touchstone of receivership law is its ability to respond to particular circumstances, as even the broadest statements of principle on the issue acknowledge. *See, e.g.*, 65 AM. JUR. 2d, Receivers, § 133 at 963 (1972) ("Ordinarily, only a person who is without interest in a cause and who stands indifferent between the parties may be appointed a receiver therein. Therefore, a party to the cause will not ordinarily be appointed receiver unless both parties consent or there are special circumstances present which make such an appointment clearly for the best interest of all concerned").

[56] The modern Bankruptcy Code provides more defined rules than had been the practice in the context of equity receiverships. *See, e.g., Rome* v. *Braunstein*, 19 F.2d 54, 57-58 (1st Cir. 1994) (noting uniquely strict conflict of interest rules established under the Code are creatures of statute). What is permitted under the Bankruptcy Code, generally is, therefore, *a fortiori*, permissible under receivership law.

Equipment Mfg. Co., 106 F.Supp. 699, 707 (D.Neb.), *appeal dis'd*, 202 F.2d 955 (8th Cir. 1952) (where beneficiaries of trust knew and consented to trustee earning commissions by placing the insurance through his own agency and where there was no evidence of overreaching, the court had discretion to approve practice); *see also, e.g., In re Palm Coast: Matanza Shores Ltd.* v. *United States Trustee*, 188 B.R. 741 (S.D.N.Y. 1995); *In re Wilkinson Distributing Co.*, 106 B.R. 658, 660 (Bankr.D.Haw. 1989);[57] *In re Greenley Energy Holdings of Pennsylvania, Inc.*, 94 B.R. 854 (Bankr.E.D. Penn. 1989).[58]

In *Matanza Shores*, the district court reviewed a bankruptcy court decision permitting a trustee to hire his own real estate firm to sell the chief assets of the bankruptcy estate. The *Matanza Shores* Court considered whether the Bankruptcy Code, which specifically permits a trustee to hire his or her own accounting or law firm for purposes of assisting the estate, limits a trustee's ability to hire his or her own firm only for the services listed or whether the Code permits a trustee to hire firms in which he or she has an interest to do other forms of work for the estate. Reasoning that Congress could have expressly prohibited a trustee from employing his own business, the *Matanza Shores* court declined to read a prohibition into the statute. Having found no bar at law, the court did not reach for one in equity.

Likewise, I decline to impose a broad prohibition in this case. I decline to hold, in equity, that a receiver may not make

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[57] The *Wilkinson* Court considered whether a trustee could provide professional services for the estate he served. *See* 11 U.S.C. § 327(a) and (d). The court noted: "There is no reason that the Trustee should not be permitted to perform such services, provided that he is qualified to perform the services, and the fee charged is commensurate with his qualifications and comparable to that charged in the open marketplace." *Wilkinson*, 106 B.R. at 661.

[58] In *In re Greenley Energy Holdings*, the court upheld a trustee's decision to enlist the assistance of his brother who was an engineer with extensive experience in the development of products in the industry of the bankrupt estate not invalidated because relationship was "candidly set forth" and supported by creditors.

use of his own brokerage firm to sell the assets of the receivership estate, especially where, as in this case, use of the firm is so clearly not only reasonable, but in the best interests of the estate, and where there existed no fraud or concealment with respect to the relationship of the firm to the receiver. MVP was uniquely qualified to handle the sale, having both general experience in the industry and particular experience with the assets in question. Additionally, the relationship between MVP and the Receiver was "candidly set forth." It was also supported by the largest creditors of the estate and opposed by none. Finally, the Receiver sought and received court approval for a commission rate structure that was not only commercially reasonable, but also in the best interests of the estate.

The argument that the relationship between MVP as broker and Giddens as Receiver taints the proposed sale, accordingly, fails, as a matter of law and as a matter of fact.[59]

B. *Spring's Bid and TZG's Services for the Receivership*

Defendants also oppose the sale's confirmation on the ground that a principal in Spring was also a principal in a firm that provided accounting services for the Receiver over a brief period of time. Sale proponents argue that while a current receiver may not purchase trust assets, it is simply not true that someone who served as his accountant during a brief period necessarily suffers under the same disqualification.

[59] Defendants make another argument, contending that the sale is infirm because of another conflict involving MVP as the estate's broker. MVP, defendants point out, had represented Press Broadcasting in its purchase of a radio station in Atlantic City, New Jersey, WBSS-FM. MVP had entered into its brokerage agreement with Press prior to the receivership. Although invited to pursue an interest in the receivership's WFPG-AM-FM also in Atlantic City, Press declined because of its own budget limitations. The station it purchased was valued at significantly less than the receivership's station in the same market. Hence, as a matter of fact, this transaction did not limit the marketing or brokering of the receivership's radio stations in Atlantic City. I find that this factual scenario does not create a conflict of interest with respect to MVP.

Defendants' argument raises essentially three questions: first, did Zitelman serve the estate in a fiduciary capacity? Second, if he did not, is he barred from purchasing assets merely as an agent of the receiver? And third, in any case, does the prohibition against self-dealing extend to a former accountant whose offer to purchase has been twice tested by the market, where there are no comparable offers and where the creditors whom any such prohibition is designed to protect, with full knowledge of the identity of the purchaser, approve of the sale and would suffer great harm is the sale were not approved?

I shall address these questions seriatim.

1. *Status: Question of Fiduciary Obligations of Accountant*

Defendants assert, first, that a sale to Spring cannot be confirmed because of Zitelman's role as a principal of TZG. They argue that TZG's functions created a fiduciary relationship between Zitelman and the estate such that he is barred from purchasing estate assets.

Defendants assume too much. It is not always a simple matter to determine whether a fiduciary relationship exists. *E.g.*, *Keenan* v. *D.H. Blair & Co.*, 838 F.Supp. 82, 89 (S.D.N.Y. 1993) ("The precise contours of a fiduciary relationship are incapable of expression); *Franklin Supply Co.* v. *Tolman*, 454 F.2d 1059, 1065 (9th Cir. 1972) (A 'fiduciary relation' is an elusive status . . ."). There are certain relationships, such as the attorney-client relationship, partnerships, and trustee-cestui que trust, which, as a matter of law, are fiduciary in nature.

Others, such as the relationship of an accountant to the entity employing her or him, are less easily defined, and fact driven. Generally, a fiduciary relationship will be held to exist between two persons "when one of them is under a duty to act or give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) Torts § 874, comment a (1979).

Where the relationship of the parties is not as a matter of law fiduciary in nature, the burden is on the party asserting the relationship to prove its existence. *E.g.*, *Shofhall* v. *Allied Van Lines*, 455 F.Supp. 351, 360 (N.D. Ill. 1978). The question of whether a fiduciary relationship exists is generally determined as a question of fact. *See*, *e.g.*, *Wolf* v. *Weinstein*, 372 U.S. 633, 652 (1963); *Pope* v. *University of Wash.*, 121 Wash.2d 479 (Wash. 1993), *cert. denied*, 114 S.Ct. 161 (1994).

Defendants simply have not met their burden. They have not established that TZG was in a fiduciary relationship to the estate such that Zitelman is disqualified from purchasing the estate's assets.

Absent particular circumstances, an accountant-client relationship does not give rise to fiduciary obligations. *See Stainton* v. *Tarantino*, 637 F.Supp. 1051 (E.D. Pa. 1986) (accountant held not to have automatic fiduciary duties); *Tyra* v. *Woodson*, 495 S.W.2d 211 (Tex. 1973) (short term business relationship insufficient to support imposition of a constructive trust). Where an accountant merely performs basic accounting functions, no fiduciary relationship is created. Only where an accountant's client is shown to rely on the judgment and advice of the accountant is a fiduciary relationship created. *See*, *e.g.*, *Myers* v. *Finkle*, 950 F.2d 165, 168 (4th Cir. 1991) (where accountant gave investment advice, a fiduciary relationship was created with respect to all services rendered by that accountant); *Martin* v. *Feilen*, 965 F.2d 660, 669 (8th Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993) (examining fiduciary status of accountant in the context of an Employee Retirement Income Security Act [ERISA] plan); *comp. DeLorean Motor Co. et al.* v. *Smith et al.*, 56 B.R. 936 (Bankr.L.D.Mich. 1986) (where performing audits, the court found that accountant's client reposited "faith, confidence, trust and reliance . . . upon the judgment and advice" of the accountant such that a fiduciary relationship arose); *with Federal Deposit Ins. Corp.* v. *Schoenberger*, 781 F.Supp.1155 (E.D.La. 1992) (where accountant as auditor

had duty of independence and impartiality, no fiduciary relationship arose with any single client).

The weight of legal precedent — and common sense — stands for the proposition that an accountant takes on fiduciary obligations only where he or she "recommend[s] transactions, structure[s] deals, and provide[s] investment advice," *Martin* v. *Feilen*, 965 F.2d at 699, such that he or she exercises some managerial control over the assets in question.

In this case, there is no evidence that Zitelman's services to the receivership estate created a fiduciary relationship. As detailed above, the tasks performed by TZG were ministerial in nature. TZG simply did not provide management advice or exercise any discretionary control over the operations or sale of the Radio Stations, nor did TZG have access to confidential information or even raw financial data. Accordingly, I find that neither TZG nor Zitelman individually had a fiduciary relationship with the estate.

2. *Sale to Former Accountant's Partnership*

Since Zitelman did not have fiduciary obligations to the receivership estate, the question becomes whether he, as an agent of a receiver, is nevertheless prohibited from purchasing assets of the receivership estate.[60]

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[60] Even if Zitelman were determined to have had fiduciary obligations to the estate, this sale could — and would — still be confirmed. Generally, courts have not imposed an absolute ban on *former* trustees or fiduciaries purchasing trust property.

The central issue is whether the sale is tainted by fraud or impropriety, that is "where, through personal as opposed to arms-length dealing, property of the estate is obtained at the lowest price as opposed to a higher price, and where the relationship between the seller and the buyer has been concealed," *In re Wild Horse Enterprises, Inc.*, 136 B.R. 830, 842 (Bankr.C.D.Cal. 1991), or where the sale of assets to an insider appears to be done in bad faith. The question as to bad faith turns on whether the insider "breached its fiduciary duty of full disclosure." *Id.* Where the fiduciary did not, where he or she engages in vigorous arms-length negotiations, and where he avoids conflict of interest, the sale may be approved.

For instance, where a trustee was removed for a conflict of interest and subsequently purchased property from the bankruptcy estate in an open

Defendants argue that he is barred, relying heavily on the sweeping statements in a rather thin line of cases. *Donovan & Schuenke* v. *Sampsell*, 226 F.2d 804 (9th Cir.), *cert. denied sub. nom*, *Freedman* v. *Donovan & Schuenke*, 350 U.S. 895 (1955); *In re Frazin*, 181 Fed. 307, 310 (2d Cir. 1910); *In re Q.P.S.*, 99 B.R. 843 (Bankr.W.D.Tenn. 1989).

In *In re Q.P.S.*, a bankruptcy court determined not to confirm the sale by a debtor-in-possession (DIP) of property of the bankruptcy estate to the DIP's accountant. It interpreted Section 327(a) of the Bankruptcy Code as applying equally to agents and employees of trustees as to the trustees themselves.[61] The court stated: "A Chapter 11 trustee . . . may not deal on his or her behalf with property of the bankruptcy estate, nor permit his or her agents and/or employees to do so. . . . An agent and/or employee of a trustee is held to the same fiduciary standards as the trustee." *In re Q.P.S.*, 99 B.R. at 844; *see also Donovan & Schuenke*, 226 F.2d at 812; *but see In re Exennium, Inc.*, 715 F.2d 1401, 1404 n.5 (9th Cir. 1983); *In re Transcontinental Energy Corp.*, 683 F.2d 326 (9th Cir. 1982).[62]

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bidding sale, the court held that no per se rule required disqualification from purchasing the assets. The sale's confirmation was upheld. *Gross* v. *Russo (In re Russo)*, 762 F.2d 239, 242 (2d Cir. 1985). Indeed, as Justice Frankfurter noted in *SEC* v. *Chenery*, 318 U.S. 80, 85-86 (1943): "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"

In this case, where the creditors of the receivership estate join with the Receiver in support of this sale, where the accountant resigned his post and did not have access to confidential information, and where the market bidding processes confirm the reasonableness of the sale, I cannot say that Zitelman failed to discharge his obligations, assuming for a moment he had them.

[61] I will leave to one side the fact that *In re Q.P.S.* clearly is not controlling, since it involves a matter of construction of the Bankruptcy Code.

[62] Indeed, the weight given to *In re Q.P.S.* is not merited. The two cases on which the western District of Tennessee relied for this proposition have been either significantly narrowed, *compare Donovan & Schuenke* v. *Sampsell*, 226 F.2d at 812; *with In re Transcontinental Energy Corp*, 682 F.2d

Their reliance on this line of cases is misplaced. The First Circuit has never adopted the reasoning announced in the cases cited by the defendants. I decline to do so now.

While the attraction of a broad rule prohibiting any agent of a trustee from ever purchasing trust assets is obvious, the problems with such an approach are equally clear. Therefore in bankruptcy as well as in other trust or receivership contexts, courts balance the need for a fiduciary's highest fidelity to the estate and its beneficiaries, with the practical concern for liquidating assets in a reasonable and efficient manner.

Generally, where bad faith, fraud or impropriety has been established, courts have been willing to set aside or disallow sales of estate assets to individuals other than a trustee who have had some role in administering the estate.[63] However, absent such evidence, courts have been unwilling to stymie the efforts of a receiver or trustee to accomplish his or her goal of liquidation or reorganization.[64] *See, e.g., Jackson* v.

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326 (9th Cir. 1982), or flatly overruled. *Comp. In re Exennium, Inc.*, 23 B.R. 782 (1982); *with In re Exennium, Inc.*, 715 F.2d 1401 (2d Cir. 1983).

[63] For instance, in *In re Intermagnetics America, Inc.*, 926 F.2d 912 (9th Cir. 1991), the court permitted a trustee to bring an action against the debtor's chief executive officer when it was discovered that the CEO had indirectly purchased the assets of the estate after secret negotiations with the subsequent purchaser. The court held that officers of the DIP are officers of the court and that the sale should therefore have been disallowed. *Id.* at 917.

[64] The *per se* rule has not even been followed uniformly in the circuits in which it has been announced as the standard within the context of bankruptcy liquidation proceedings.

Instead, even those courts have opted to adhere to a rule which respects both the need to sell assets in sometimes specialized markets and the need to avoid impropriety. For instance the Ninth Circuit, in *Jackson* v. *Pacific Energy Resources*, 583 F.2d 326 (9th Cir.), *cert. denied*, 439 U.S. 912 (1978), considered whether to set aside a confirmed bankruptcy sale where the buyer was an employee of the debtor-in-possession (DIP). The court determined that not all employees of the DIP must be disqualified from purchasing property from the estate, holding that only where the buyer holds a position of "unfailing loyalty, trust and confidence" with respect to the debtor or his or her estate would that employee be barred from purchasing property. Interestingly, this decision harkened back to a District of Massachusetts' case concerned with equity receiverships, in which the

Pacific Energy Resources (In re Transcontinental Energy Corp.), 683 F.2d 326 (9th Cir. 1982); *In re Rex Body Corp.*, 138 F.2d 912, 913 (2d Cir. 1943); *In re National Mining Exploration Co.*, 193 F. at 236-237.[65] Precedent simply does not support the proposition that individuals other than the receiver or trustee are subject to a *per se* disqualification as a purchaser of estate assets. This rule makes sense. Agents or employees of an estate — former or current — are often those in an industry or business community most likely to be interested in purchasing liquidated assets; to foreclose the possibility of even entertaining the bids of individuals who have had any connection to the estate would impermissibly chill the liquidation process and risk defeating another central goal of liquidation through receivership: the maximizing of the value of the assets for the benefit of the creditors.

This practical concern gives rise to still another: that courts carefully monitor the sales process and assure that there is full disclosure and good faith. Where negotiations are conducted at arms length, subjected to public scrutiny, and involve all the parties, absent a showing of a breach of fiduciary duty, the sale should be approved. *See, e.g., In re Apex Oil Co.*, 92 B.R. 847, 870 (Bankr.E.D.Mo. 1988); *accord Bray* v. *United States Fidelity & Guaranty Co. (In re Evansville Contract Co.*, 267 F. 533 (4th Cir. 1920).)[66]

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court had permitted a sale of property to a company, notwithstanding the fact that one of the estate's trustees was a director for, and a stockholder in, the company, noting that the involvement was fully disclosed, creditors had encouraged the purchase, and all the bankrupt's stockholders had been given a full and fair opportunity to participate in the sale. *In re Mining Exploration Co.*, 193 F. 232, 236-38 (D. Mass. 1911).

[65] As the *Transcontinental Energy Court* stated: "[U]nsubstantiated hypotheses and groundless innuendos" cannot substitute for proof of breach of duty. *Transcontinental Energy*, 683 F.2d at 328.

[66] In *Apex Oil*, the court approved the sale of substantial assets to a group in which the controlling partners of the debtor were major non-controlling shareholders of the estate. The court found that "the Asset Purchase Agreement was the product of vigorous arms length, good faith negotiations among sophisticated parties. The Asset Purchase Agreement has evolved in a 'fish bowl' under the watchful eye of the Examiner and the Committee,

This is such a case. Spring and the Receiver negotiated this sale and engaged in public bidding on its terms, under the watchful eyes of the estate's creditors, the debtors and the Magistrate Judge. Competing bids were solicited on three separate occasions: once before and twice after Zitelman's accounting firm, TZG, had resigned its position with respect to the receivership estate. All negotiations were at arms length and occurred after TZG's resignation; Zitelman possessed no information or assistance that was unavailable to all other bidders. Without question, the broker at all times acted with only one goal in mind: to maximize the proceeds of the sale for the benefit of the creditors. Without question, this goal has been accomplished.

Additionally, it is abundantly clear in this case that the bid procedures, monitored at each stage by the Magistrate Judge, were fair and reasonable. Finally, I find that the sale has been proposed to this Court for confirmation upon proper notice and good faith. No evidence of collusion, fraud or deceit undermines this proposed sale.

C. *Best Interests of the Estate*

Finally, having determined that no broad public policy or established precedent erects a procedural bar to the sale's confirmation, I must determine whether this sale is commercially reasonable and in the best interests of the receivership estate.

The federal statute governing receivership sets forth the standards for sale of personalty by receivers at 28 U.S.C. § 2004. It provides that the court may sell personalty, "upon such terms and conditions as the Court approves, if it finds that the best interests of the estate will be conserved thereby." *Id.*

Defendants argue that this sale is tainted. Defendants charge that the collusion which they believe is present is this

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with involvement of all major interested parties." *Id.* After the court conducted a three day hearing, it found no evidence that there had been a breach of fiduciary duty by the insiders and the motion to approve the sale was made upon adequate and proper notice and good faith.

transaction has had chilling effects on the willingness of others to bid on the four assets in question and that, therefore, there is no promise that the price for which Spring is asking to buy these assets is commercially reasonable and in the best interests of the estate.

I find defendants' arguments unpersuasive and entirely lacking in evidentiary support.[67]

Commercial reasonableness may be established by a showing that the estate's assets are being sold for market value. *See Kobuk Engineering & Contracting Services, Inc.* v. *Superior Tak & Constr. Co-Alaska Inc.*, 568 P.2d 1007, 1011 (Ala. 1977); *Vic Hansen & Sons, Inc.* v. *Crowley*, 203 N.W.2d 728, 731 (Wis. 1973); *see also Jackson* v. *Smith*, 254 U.S. 586, 588 (1921); *Phelan* v. *Middle States Oil Corp.*, 220 F.2d 593, 605 (2d Cir.), *cert. denied sub. nom, Cohen* v. *Glass*, 349 U.S. 929 (1955); *c.f.*, U.C.C. § 9-507(2).[68]

In this case, the market has spoken on three different occasions, over a significant period of time. Reasonably identified potential bidders have been presented, fully and fairly, in my determination, with notice of the assets for sale, accurate descriptions of those assets and the contracts which might be assumed, and opportunities to purchase them.[69] Indeed,

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[67] It is true of course that no competing bidder attempted to outbid Spring despite being given two opportunities to do so. There is no evidence, however, that the absence of competing second or third round bids was due to anything other than the fact that the Spring bid equalled or exceeded fair market value for the assets.

[68] The Uniform Commercial Code provides that a secured creditor who has "sold in conformity with reasonable commercial practices among dealers in the type of property sold . . . has sold in a commercially reasonable manner." U.C.C. s. 9-507(2). Section 9-507 of the U.C.C. also provides that a sale will be considered "commercially reasonable" if it is made "in the usual manner in a recognized market, or sold at a price current in such market at the time of sale." U.C.C. s. 9-507(a).

[69] The U.C.C. requires that adequate notice be provided before a sale may be considered commercially reasonable. U.C.C. s. 9-504(3). Where a secured party is the seller of assets, that seller should (1) adequately describe in the notice the collateral to be sold as well as the time and place of the sale; (2) provide the notice sufficiently in advance of the sale to permit a reasonable opportunity for such people to participate; (3) distribute the

uncontroverted testimony presented to this Court indicates that the price offered by Spring for the assets is at least equal to fair market value, particularly in light of the full context of this sale.

Furthermore, despite months of efforts, defendants have not unearthed evidence of collusion or a single potential bidder who determined not to participate in the process because of the nature of the parties already involved.[70]

Finally, the repeated willingness of both the Receiver and Spring to submit this Purchase and Sale Agreement — and its various amendments — to the light of additional public scrutiny is inconsistent with the view of this sale as a shadowy inside deal.

Accordingly, after conducting evidentiary hearings on October 27, 1995, November 3, 1995 and again on January 19, 1996, I have determined that the process was conducted in a commercially reasonable fashion and that the results indicate that this sale is not only commercially reasonable, but also in the best interests of the receivership estate. This ruling extends not only to the terms contains in the purchase and

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notice to people who can be reasonably expected to have an interest in bidding; and (4) publish the notice in a manner reasonably calculated to assure the end result of competitive bidding and realization of the best possible price. *See Leasing Serv. Corp.* v. *Diamond Timber, Inc.*, 559 F.Supp. 972 (S.D.N.Y.), *aff'd*, 729 F.2d 1442 (2d Cir. 1983).

In this case, notice clearly was adequate, in each of the three rounds of bidding. The process of identifying bidders, the use of trade publications to cast the net more widely, the extension of bidding periods to ensure that parties could complete due diligence or have the most current rating figures: these procedures ensure the fairness of the notice.

[70] The sale opponents have challenged the open nature of the bidding process, arguing on January 19, 1996 that the fact that both the Consulting Agreement and the contract spelling out the amended LMA specifically pertained to Spring, thus creating an impression that the deal had been sealed. From the evidence before this Court, I cannot agree. The materials sent out in the third round bidding package indicated that the terms, subject to court approval, would be available to any successful bidder. Had any bidder been interested and troubled by what seemed like a limitation, he or she surely would have inquired and had his or her concerns allayed. No such inquiry was reported.

sales agreement, but also to the negotiations which culminated in the amended LMA, the proposal that Spring assume that amended LMA for WKOE in exchange for a waiver of the Material Adverse Change Clause contained in the Purchase and Sale Agreement, dated July 31, 1995, as amended on August 1, 1995, and the proposal that Spring enter into a Consulting Agreement with the Receiver.

It is my determination that these final amendments, along with the terms of the Purchase and Sale Agreement, dated July 31, 1995, as amended on August 1, 1995, are reasonable and in the best interests of the estate.

IV. Conclusion

For the foregoing reasons, I ALLOW the Receiver's Motion for Sale and Confirming Sale of Receivership's Assets to Spring Broadcasting, L.L.C. and ALLOW the Receiver's Motion to Approve Assumption, Assignment and Amendment of the Local Management Agreement, to Approve Waiver of Material Adverse Change Clause and to Enter into a Consulting Agreement.[71]

SO ORDERED.

Dated: April 9, 1996

Nancy Gertner

Nancy Gertner, U.S.D.J.

[71] This memorandum accompanies my ruling announced in court on January 19, 1996.

United States Court of Appeals
For the First Circuit

No. 96-1218
No. 96-1523

FLEET NATIONAL BANK,

PLAINTIFF-APPELLEE,

v.

H&D ENTERTAINMENT, INC.,
F/K/A DOVER BROADCASTING, INC., ET AL.,

DEFENDANTS-APPELLANTS.

BEFORE

TORRUELLA, *Chief Judge*,
SELYA, CYR, BOUDIN, STAHL, *Circuit Judges*,
BARBADORO,* *District Judge*.

ORDER OF THE COURT

Entered: October 28, 1996

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for rehearing enbanc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court enbanc,

*Of the District of New Hampshire, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By The Court:

WILLIAM H. NG, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Glervin, Morton, Gaynor, Hanify, Grossman, Glerum, Gordon, Wheatley, Ms. Walker]

Supreme Court, U.S.
FILED
FEB 26 1997
CLERK

No. 96-1195

In The

Supreme Court of the United States

October Term, 1996

H & D ENTERTAINMENT, INC., ET AL.,

Petitioners,

v.

FLEET NATIONAL BANK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court reverse the First Circuit and adopt a *per se* disqualification rule which would preclude a receiver from selling receivership assets to a non-fiduciary whose affiliate (also a non-fiduciary) temporarily performed accounting services for the receivership prior to the sale, where there is no evidence of bad faith, fraud, collusion or the use of inside information?

2. Should this Court reverse the First Circuit and void a sale of receivership assets simply because the receiver engaged his firm as a broker for the sale where (i) the receiver obtained prior court approval to retain his firm, (ii) the Petitioners did not properly raise the issue below, (iii) there is no conflict between the circuit courts with respect to this issue, and (iv) the district court found the sale was commercially reasonable and in the best interests of the receivership estate?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Respondents hereby make the following Corporate Disclosure Statement, identifying parent companies and nonwholly owned subsidiaries:

1. Fleet Financial Group, Inc. is the parent company of Respondent Fleet National Bank ("Fleet") and its shares are publicly traded. Fleet owns an interest in the following nonwholly owned subsidiaries: Allied International Bancorp, Inc., GTT Realty Limited Partnership and Onyx Properties Limited Partnership. Through wholly owned subsidiaries, Fleet also owns an interest in the following partnerships: SL Mortgage Company, Limited Partnership, Wamsutta Partners, and Broadmoor Property Associates.

2. PNC Bank Corp. is the ultimate parent of Respondent PNC Bank, Ohio, N.A. ("PNC"), and its shares are publicly traded. PNC does not own any shares of a nonwholly owned subsidiary.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Fleet National Bank (the "Bank"), PNC Bank, Ohio, N.A., and Charles E. Giddens, the court-appointed receiver (the "Receiver"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the First Circuit's opinion in the case below. The Petitioners argue that the First Circuit's decision approving the sale of receivership assets should be reversed for two reasons: (1) the assets were sold to a company whose affiliate had performed ministerial accounting services for the Receiver; and (2) the Receiver, with prior court approval, retained his own brokerage firm as the broker for the sale. Neither argument presents an "important federal question" justifying commitment of additional judicial resources to review this case on certiorari. Sup. Ct. R. 10. None of the issues that were raised before the First Circuit in this case were addressed in the cases relied upon by the Petitioners to suggest a conflict with decisions of this Court or decisions of other circuit courts. Moreover, none of the cases cited by the Petitioners support a decision contrary to the decision rendered by the First Circuit. There being no important federal question or conflict with either a decision of this Court or decisions of other circuit courts, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

On December 2, 1994, the Bank commenced the underlying action against H & D Entertainment, Inc.; H & D Wireless Limited Partnership; H & D Media Limited Partnership; H & D Broadcasting Limited Partnership; and H & D

Radio Limited Partnership (collectively, the "H & D Group") seeking to collect over $12.9 million owed under certain notes and guarantees. Petitioners' Appendix ("App.") 22. On December 5, 1994, the district court entered an order appointing Charles E. Giddens as Receiver of the H & D Group and directing him to take possession of, manage, operate, and, subject to court approval, sell the assets of the H & D Group, which then consisted primarily of four am/fm combination radio stations (the "Radio Stations"). App. 22-23.

On February 3, 1995, the Receiver moved for approval to employ his firm, Media Venture Partners ("MVP"), as broker for the sale of the Radio Stations. App. 26. On March 9, 1995, after notice and a hearing, the magistrate judge approved MVP's employment – a fact omitted from the Petitioner's brief. App. 26. The Petitioners never requested that the district court reconsider the magistrate's order. App. 26, n.17.

MVP then solicited and received twenty-four first round bids for the Radio Stations on or before April 13, 1995. App. 26-29. Thereafter, the Receiver negotiated and, on July 31, 1995, entered into a Purchase and Sale Agreement with the high bidder, Spring Broadcasting, L.L.C. ("Spring"). App. 31-33. After five days of hearings and several modifications, the magistrate judge approved a sale procedure which involved a second round of competitive bidding, whereby MVP solicted counteroffers to Spring's Purchase and Sale Agreement.[1] App. 34. No

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[1] In their Statement of the Case, Petitioners allege that "after April 17, 1995, the Receiver never contacted the two bidders whose bids, in combination, totaled $14,300,000." *See* Petition, p. 6. That allegation is contrary to the district court's

second round counteroffers were submitted. App. 35. On October 27 and November 3, 1995, the district court held evidentiary hearings on the Receiver's motion to approve the sale to Spring. App. 35.

The Receiver then filed a motion requesting approval of three changes to the agreement between the Receiver and Spring. App. 37. The amended terms were put out to the public for a third round of competitive bidding. App. 37-39. Again, no counteroffers were submitted. App. 38.

On January 19, 1996, the district court conducted a third evidentiary hearing on the motion to approve the sale of the Radio Stations to Spring. App. 39. While the Petitioners made a number of attacks on the sale, they primarily maintained that Spring should be disqualified from purchasing the Radio Stations because a principal of Spring, P. Richard Zitelman ("Zitelman"), was also a principal of The Zitelman Group ("TZG"), an entity that had performed ministerial accounting functions for the Receiver at the inception of the receivership. The Petitioners argued that the district court should adopt a *per se* rule which would disqualify virtually anyone ever employed by the Receiver from purchasing the assets of the estate.

The district court rejected the Petitioners' arguments that a *per se* rule disqualified Spring. Instead, the district court followed a case-by-case approach which would disqualify a purchaser only where the sale is tarnished by

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findings of fact that after August 22, 1995, "MVP, again acting as broker for the Receiver, distributed notice of the second round bidding procedures to all the unsuccessful first round bidders, as well as to others who expressed an interest in the Radio Stations." App. 34.

bad faith, fraud or collusion. App. 49. Applying that analysis, the district court found no evidence of bad faith, fraud or collusion and found the sale to Spring to be commercially reasonable and in the best interests of the estate. App. 51-52.

The district court's decision was based in large part upon its finding that even during TZG's limited tenure as accountant for the Receiver, neither TZG nor Zitelman had a fiduciary relationship with the estate. App. 47. TZG had performed only very limited services for the estate on a temporary basis. Specifically, the district court found that "[a]lthough TZG offered a wide range of services, the Receiver only engaged TZG in a limited capacity, hiring the firm to perform certain ministerial accounting functions." App. 25. "TZG did not advise the receivership, provide financial audits, or direct investment of assets, with respect to the Radio Stations; nor did it participate in management decisions with respect to the operation of the Radio Stations or get involved in the MVP's sale efforts." *Id.*

TZG did not "have access to confidential information or even raw financial data" and was never given any information that was not available to other bidders. App. 29 and 47. Nor could Spring "responsibly have relied, in preparing its bid, on information to which Zitelman had access because of TZG's services." App. 28, n.23. Moreover, the relationship between the Receiver and TZG terminated on June 19, 1995, before negotiation of the

Purchase and Sale Agreement and before the second and third rounds of competitive bidding.[2] App. 31.

Finding that no *per se* rule disqualified Spring from purchasing the Radio Stations and rejecting the Petitioners' other arguments, on April 12, 1996, the district court entered an order approving the sale to Spring. The Petitioners appealed to the First Circuit raising, among other issues, the same argument concerning the propriety of Spring purchasing the assets. The Petitioners did not then argue – as they attempt to do here – that the sale should not have been approved because of the fact that the Receiver's firm was engaged as a broker for the sale.

The First Circuit Court of Appeals affirmed, noting that "the district court and the magistrate judge have done a very able job in handling this complex and contentious case." App. 16. Agreeing with the district court's case-by-case approach, the First Circuit Court stated that "the greater weight of authority is that any judgments as to disqualification of a non-fiduciary purchaser should be made on a case-by-case basis, taking account of all of the surrounding circumstances." App. 14. The First Circuit

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[2] The Petitioner's Statement of the Case on this issue again includes allegations directly contrary to the district court's findings of fact. Petitioners contend TZG resigned "more than half-way through negotiations of the Spring P&S." *See* Petition, p. 6. The district court expressly found that "prior to the negotiation of a purchase and sale agreement, TZG resigned as the Receiver's accountant." App. 31. The district court further found that "[a]ccording to credible testimony before this [c]ourt, Giddens requested that Zitelman resign before the two engaged in earnest negotiations." App. 31, n.29.

also noted that even in the few jurisdictions which arguably have adopted a *per se* rule, the courts do not uniformly follow the rule. *Id.*

The Petitioners now seek review on certiorari claiming that the First Circuit's decision decided an important federal question in a way that conflicts with a decision of this Court and decisions of two circuit courts. As discussed below, they are wrong. There is nothing remarkable about the First Circuit decision which warrants further review by this Court.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THIS COURT'S RULING IN *MOSSER v. DARROW*.

The Petitioners first argue that *Mosser v. Darrow*, 341 U.S. 267 (1951), prohibits Spring from purchasing assets of the receivership estate. The facts in *Mosser*, however, bear no similarity to the facts in the case now before the Court and its rulings of law are inapplicable.

In *Mosser*, this Court held that the district court properly surcharged the reorganization trustee for profits which his employees had derived from personally trading in the debtors' securities. *Id.* at 270. The case did not involve the issue presented below concerning whether a sale should be approved. The debtors in *Mosser* were two common law trusts functioning "as holding companies and their principal assets were the securities of twenty-seven underlying companies, each of which owned

improved real estate and had its own debt and capital structure." *Id.* at 268. The reorganization trustee employed two individuals who previously had promoted the trusts. *Id.* at 269. Those individuals then managed the properties for the trustee and had "complete charge of all records of income, expenditures and properties of both debtors and all underlying companies." *Id.* Relying upon the "judgment and advice" of those individuals, the trustee then purchased and retired bonds of the debtors' subsidiaries at a discount rate. *Id.*

Without ever seeking approval from the district court, the trustee also authorized those two "key" employees, who were "indispensable" to the estate, to trade personally in the debtors' securities *while* employed by the trustee. *Id.* at 268-69 and 274. "On many occasions they acquired bonds for themselves and on the same day, or within a few days, transferred them to [the trustee] at a profit." *Id.* at 269. Those improprieties were discovered only after the Securities and Exchange Commission demanded an investigation, causing the trustee to resign and file accounts not previously filed during the *eight* years of trusteeship. *Id.* at 270. Not surprisingly, the Court held that the trustee should not have authorized the employees to self-deal and should have disclosed the conduct earlier. While recognizing the harshness of imposing a surcharge, this Court noted that the trustee could have limited, if not avoided, personal liability by disclosing the proposed relationship to the court in advance:

> The practice is well established by which trustees seek instructions from the court, given upon notice to creditors and interested parties,

> as to matters which involve difficult questions of judgment.

Id. at 274.

Completely contrary to the facts in *Mosser*, in the present case there was no undisclosed relationship which had not been subject to judicial scrutiny. Instead, the "sale has been repeatedly scrutinized by the market, by interested parties and by the court." App. 20. "It [was] the subject of three competitive bidding processes and a magistrate judge's careful monitoring, during which the relevant parties were given an opportunity to object to sale procedures and substance, and through which, where appropriate, the procedures adopted came to reflect the concerns of the parties." App. 20.

Moreover, the relationship between the receivership estate and Spring in this case is completely different from the relationship between the debtors' estate and the trustee's employees in *Mosser*. Unlike the employees in *Mosser*, Spring was never employed by the Receiver. Spring's affiliates TZG and Zitelman neither performed any key services for the Receiver nor were employed by the Receiver at the time of the sale. The district court specifically found that neither TZG nor Zitelman owed a fiduciary duty to the estate. App. 47. Unlike the employees in *Mosser* who provided advice to the trustee, "TZG did not advise the receivership, provide financial audits, or direct investment of assets, with respect to the Radio Stations; nor did it participate in management decisions with respect to the operation of the Radio Stations or get involved in MVP's sales efforts." App. 25. Further, unlike the employees in *Mosser* who purchased assets of

the debtor and resold those assets to the trustee *while* employed by the trustee, TZG was not performing any services for the estate at the time the Purchase and Sale Agreement was negotiated or during the second or third rounds of competitive bidding. App. 31. *Mosser* is simply not on point and the decision below is not so "repugnant to controlling rules and decisions of this Court" as to warrant the grant of certiorari. *Wilson v. Schnettler*, 365 U.S. 381, 383 (1961).

II. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

While the First Circuit may not have been persuaded by the reasoning in the narrow line of cases relied upon by the Petitioners, the decision below did not create a conflict between the circuit courts as the Petitioners suggest. First, neither the Ninth nor the Second Circuit Courts of Appeals ever has adopted a *per se* rule which would disqualify a non-fiduciary from purchasing assets of the estate in the absence of fraud, collusion or bad faith. Second, even if the cases cited by the Petitioners did support recognition of such a *per se* rule, in subsequent decisions each of the Ninth and Second Circuit Courts of Appeals has rejected that rule and adopted a case-by-case approach. It can hardly be said that the First Circuit's decision below creates a "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" justifying review on certiorari. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)).

The Ninth Circuit cases cited by Petitioners do not recognize a *per se* rule which would disqualify Spring, a non-fiduciary, from purchasing the Radio Stations. In *Donovan & Schuenke v. Sampsell*, the Ninth Circuit reversed an order authorizing the sale of property of a bankrupt estate to a former president of the bankrupt who owed a fiduciary duty to the estate and who also was employed by the trustee to maintain and sell the property. *Donovan & Schuenke v. Sampsell*, 226 F.2d 804 (9th Cir.), *cert. denied sub nom., Freedman v. Donovan & Schuenke*, 350 U.S. 895 (1955). The court in *Donovan* stated that "[a] fiduciary cannot purchase property which he is empowered to sell." *Id.* at 811.

Unlike the purchaser in *Donovan*, Spring was not a fiduciary. Further, Spring's affiliate TZG was not a fiduciary of the estate, and was not employed by the receivership at the time of the sale. In further contrast to the purchaser in *Donovan*, neither Spring nor TZG was ever employed *at any time* to sell the Radio Stations or to advise the Receiver in any way with respect to the sale.

Whatever precedential force *Donovan* may have had, it has been narrowed substantially by *In re Transcontinental Energy Corp.*, 683 F.2d 326 (9th Cir. 1982), a case much more analogous to the one now before the Court. Like the Petitioners here, the appellants in *Transcontinental* relied on language in *Donovan* that would "make any person a trustee or fiduciary who has had a connection with any other person or entity or who has been employed or concerned with the affairs of others and thereby acquired a knowledge of the property and concerns of the others." *Transcontinental*, 683 F.2d at 328 (quoting *Donovan*, 226 F.2d at 811). The Ninth Circuit found their argument to

"rely too heavily on the 'broad dicta' " in *Donovan* and accordingly confirmed a judicial sale where an individual related to the purchaser previously had operated a portion of the assets, but where, as here, the purchaser did not owe the bankrupt a fiduciary duty and there was no evidence of bad faith, fraud, collusion, or use of inside information. *Transcontinental* at 328-29.

Similarly misplaced is the Petitioners' reliance on *In re Exennium, Inc.*, 23 B.R. 782 (Bankr. 9th Cir. 1982), *rev'd*, 715 F.2d 1401 (9th Cir. 1983). In that case, the purchaser had been the *attorney* for the debtor and therefore owed the estate a fiduciary duty. 23 B.R. at 786. The Ninth Circuit reversed *Exennium* on other grounds and criticized the underlying court's reading of *Donovan* "as holding that sales to fiduciairies can be overturned at any time because they are void." *In re Exennium, Inc.*, 715 F.2d 1401 (9th Cir. 1983).

The Second Circuit case relied upon by the Petitioners, *In re Frazin & Oppenheim*, 181 F. 307 (2d Cir. 1910), also does not support a *per se* rule which would have disqualified Spring from purchasing the Radio Stations. There the Second Circuit considered "whether an official appraiser of a bankrupt estate may, prior to the filing of the appraisal, purchase property of the estate." *Id.* at 308-309. Significantly, the court observed that the appraiser was "an officer of the court," and that he "necessarily obtain[ed] confidential information concerning the cost of the property to be appraised and concerning many other matters affecting its value and the price to be obtained for it." *See id.* at 311. Simply stated, the court was faced with a purchaser who possessed confidential information and could exploit it to his advantage and to

the detriment of the estate. *See id.* at 310. Expressly left open was the question of whether the appraiser could purchase from the estate after filing his appraisal. *Id.* at 311.

Frazin is inapposite here. First, unlike the appraiser, "neither TZG nor Zitelman individually had a fiduciary relationship with the estate." App. 47. Second, unlike the appraiser, "the tasks performed by TZG were ministerial in nature." App. 47. Moreover, "TZG [did not] have access to confidential information or even raw financial data." App. 47. As a result, neither TZG nor Spring possessed confidential information that they could exploit for their benefit and to the detriment of the receivership estate and its creditors.

Moreover, the Second Circuit implicitly has overruled *Frazin* and adopted the case-by-case approach adopted by the First Circuit below. *See In re Rex Body Corp.*, 138 F.2d 912, 913 (2d Cir. 1943) (approving sale of estate to fiduciary of the bankrupt). *See also In re Beck Indus., Inc.*, 605 F.2d 624, 635-37 (2d Cir. 1979) (refusing to follow *Donovan*); *In re General Insecticide Co.*, 403 F.2d 629, 631 (2d Cir. 1968) (finding *Donovan* inapposite "because the purchaser . . . was not a fiduciary with respect to the property sold").

The First Circuit's decision below is not "in conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10. The First Circuit decided the issue of whether a *non-fiduciary* may purchase assets of the estate in the absence of bad faith, fraud or collusion. Because the Ninth and Second Circuit decisions cited by Petitioners do not address the issues

raised below – and are not even uniformly followed within those circuits – there is no conflict between the circuit courts.

III. *MANTANZA SHORES* DOES NOT WARRANT GRANTING CERTIORARI

A. Petitioners Waived And Abandoned Any Right to Challenge The Sale Based On MVP's Engagement As Broker.

The Petitioners now attempt to argue that the sale should be reversed because the Receiver's firm was engaged as the broker for the sale. That argument, however, was not made to, or addressed by, the First Circuit. There is, therefore, no conflict between the circuit courts warranting further review by this Court.

On March 9, 1995, upon notice and after hearing, the magistrate judge approved the retention of MVP as the Receiver's broker for the sale of the Radio Stations. App. 26. The Petitioners failed to move for reconsideration or to file an objection to the magistrate's order in the district court. *Id.* Such failure operated as a waiver of the Petitioners' right to seek further appellate review of the magistrate's decision. *Thomas v. Arn*, 474 U.S. 140, 155 (1985) (determination that failure to object to magistrate's order within mandated time frame waives right to later appeal of order did not violate petitioner's due process rights); *Pagano v. Frank*, 983 F.2d 343, 346 (1st Cir. 1993) (party who fails to file objections to magistrate's non-dispositive order within ten days "may not thereafter assign as error a defect in the magistrate's order") (*citing* Fed. R. Civ. P. 72); *U.S. v. Ecker*, 923 F.2d 7 (1st Cir. 1991)

(magistrate's order is generally not a final order which is subject to direct appellate review; the argument must be made first to the district court); *see also Keller v. Petsock*, 849 F.2d 839, 842 (3rd Cir. 1988) (court of appeals is without jurisdiction to hear appeal of magistrate's order that is not first raised in district court); *but see Greenhow v. Secretary of Health & Human Servs.*, 863 F.2d 633, 636 (9th Cir. 1988) (failure to file objections to magistrate's order waives only factual issues on appeal).

Furthermore, in their brief to the First Circuit, the Petitioners did not challenge the propriety of the Receiver's retention of MVP as broker.[3] The First Circuit quite appropriately did not address this issue because the Petitioners had abandoned and waived this argument. *See Nagle v. Alspach*, 8 F.3d 141, 143 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1215 (1994) (when issue not set forth in statement of issues or pursued in appellate brief, the issue is deemed abandoned and waived); *United States v. Tracy*, 989 F.2d 1279, 1286 (1st Cir.), *cert. denied*, 508 U.S. 929 (1993) (issues advanced with virtually no argument and no citation to authorities are deemed waived); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 352 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990) (university abandoned argument when it failed to address argument in appellate brief).

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[3] While the Petitioner's preliminary statement of issues filed with their designation of the appendix included reference to MVP's engagement as broker, the issue was not included in either of the Statement of the Issues or Argument sections of their brief.

It is axiomatic that absent "exceptional circumstances" the Supreme Court will not consider issues that were neither raised nor considered by the court of appeals. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 546 (1990); *Lawn v. United States*, 355 U.S. 339, 362-63, n.16 (1958). The "exceptional circumstances" required are not present here. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1975) (important conflict between state and federal statutes); *Pollard v. United States*, 352 U.S. 354, 359 (1957) (criminal pro se defendant allowed to raise issues of constitutional significance which were not considered below).

This Court has recognized that the rule against considering issues not raised in the courts below is required to preserve judicial economies. *See Thomas v. Arn*, 474 U.S. at 147. Absent such a rule, this Court would be forced to review issues not reviewed by the circuit court, and the circuit court would be forced to review every issue raised in the district court even though not presented for review by the parties. The petition for writ of certiorari should be denied simply because the Petitioners did not properly raise this argument below and have presented no "exceptional circumstances" which would warrant review of this issue in this Court.

B. In Any Event, the Second Circuit's Decision in *Mantanza Shores* is Not in Conflict With the First Circuit's Decision Below.

Even if the First Circuit had addressed the propriety of retaining MVP and its effect on the sale, the First Circuit's decision approving the sale would not be in

conflict with the law of the Second Circuit. The Petitioners contend that the First Circuit's decision below is in conflict with the decision in *In re Palm Coast, Mantanza Shores Ltd. Partnership,* in which the Second Circuit reversed an order permitting a Chapter 11 bankruptcy trustee to retain his own brokerage firm. *Mantanza Shores,* 101 F.3d 253, 258 (2d Cir. 1996). Like the other cases cited by the Petitioners, *Mantanza Shores* is not on point. In *Mantanza Shores,* the Second Circuit addressed "the question of whether the Bankruptcy Code permits a bankruptcy trustee to employ his real estate firm as real estate consultant to the bankruptcy estate." *Id.* at 256. The Code specifically provides that the trustee may employ only professional persons "that do not hold or represent an interest adverse to the estate, and that are disinterested persons." 11 U.S.C. 327(a). This case, however, concerns a receivership not governed by the Bankruptcy Code. Unlike a bankruptcy case, a federal receivership is governed by equitable principles which allow a court to approve a sale under terms and conditions in the best interest of the receivership estate. *See, e.g., Citibank, N.A. v. Data Lease Fin. Corp.,* 645 F.2d 333, 339 (5th Cir. 1981).

The recent decision in *Mantanza Shores* does not create a conflict between the circuit courts because the Second Circuit did not address the issues addressed by the First Circuit. There is, therefore, no compelling reason to warrant further review of this case on certiorari.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully request that this Court DENY the petition for a writ of certiorari.

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